N. 2929 No. 14676

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY a Corporation, Appellant,

vs.

JOHN BLAZIN, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—4-4-55

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States, Northern District of California, Southern Division

No. 33,178

JOHN BLAZIN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

Comes now the plaintiff John Blazin, complains of the defendant above named, and for cause of action alleges that:

I.

At all times herein mentioned defendant Southern Pacific Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and said defendant at all times herein mentioned was and now is engaged in the business of a common carrier by railroad in interstate commerce in the City of Oakland, County of Alameda, State of California.

II.

At all times herein mentioned defendant Southern Pacific Company, a corporation, was a common carrier by railroad engaged in interstate commerce and plaintiff was employed by defendant in said interstate commerce and the injuries sustained by him hereinafter complained of arose in the course

of and while plaintiff and defendant were engaged in the conduct of said interstate commerce.

III.

This action was brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq., and the Federal Safety Appliance Act, 45 U.S.C.A., Sec. 1, et seq.

IV.

On or about September 15, 1952, plaintiff was employed by defendant as a yardman and member of a switching crew, which was engaged in switching operations in the defendant's North Passenger Yard in the City of Oakland, County of Alameda, State of California.

V.

At said time and place defendant maintained a certain passenger car in violation of the Federal Safety Appliance Act, in that one of the grabirons was missing therefrom. At said time and place it became and was the duty of plaintiff to take a position on the side of said car for the purpose of operating a cutting lever in order to operate the coupling mechanism of said car, and as plaintiff reached for the grabiron of said car, said grabiron was missing, and plaintiff was caused thereby to be thrown, striking his back against the adjoining car. As a direct and proximate result of the violation by said defendant of the Federal Safety Appliance Act, as aforesaid, plaintiff sustained the following personal injuries, to-wit:

Acute cervical sprain; bilateral parascapular strain; contusions and straining of the low back; injury to the wrist; and severe shock and injury to his nervous system. By reason of said injuries and each of them, plaintiff was made sick, sore and disabled, and plaintiff is informed and believes and therefore alleges that said injuries and each of them are permanent in character.

VI.

As a direct and proximate result of the carelessness and negligence of defendant, as aforesaid, plaintiff herein has been generally damaged in the sum of $30,000.00.

VII.

As a direct and proximate result of the said carelessness and negligence of sad defendant, as hereinabove alleged, and solely by reason thereof, plaintiff has been under the care of physicians and surgeons, and has incurred and will continue to incur liability for medical services necessary to the treatment and relief of his said injuries in amounts not determined or ascertainable at this time, and plaintiff prays leave that when said amounts are ascertainable, he may be permitted to amend this complaint and insert said amounts herein.

VIII.

Prior to the happening of said accident, plaintiff was an abled bodied person capable of and in fact earning approximately $450.00 per month as a yardman. As a direct and proximate result of the said

carelessness and negligence of defendant, plaintiff was for a period of four months unable to engage in his usual or any gainful occupation, to his damage in the sum of $1800.00. Plaintiff will be for an indefinite period of time in the future unable to pursue his regular occupation or any other gainful occupation, and plaintiff prays leave of Court that when the amount of said damages suffered by him by reason of his inability to pursue his regular employment or any employment becomes known to him, he be permitted to amend this complaint in order that he may set forth said sum or sums, together with appropriate charging allegations.

Wherefore, Plaintiff Prays Judgment against the defendant above named, in the sum of $31,800.00; for his costs of suit herein incurred; and for such other and further relief as to the Court seems just and proper.

/s/ JESSE NICHOLS,
/s/ NICHOLS, RICHARD, ALLARD & WILLIAMS,
Attorneys for Plaintiff

A trial by jury of all of the issues herein is hereby demanded by plaintiff.

/s/ JESSE NICHOLS,
/s/ NICHOLS, RICHARD, ALLARD & WILLIAMS,
Attorneys for Plaintiff

[Endorsed]: Filed November 16, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now, Southern Pacific Company, a corporation, the defendant in the above entitled action, and answering the complaint of plaintiff on file herein, shows as follows:

As and for a First, Separate and Independent Answer and Defense to the complaint, the defendant Southern Pacific Company shows as follows:

I.

Admits and avers as follows:

1. At all times mentioned in the complaint and herein, defendant Southern Pacific Company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, doing business in the State of California and in other states, and engaged, among other activities, in the business of common carrier by railroad for the transportation of freight and passengers in interstate and intrastate commerce in said State of California and in other states, and in the City of Oakland, County of Alameda, State of California.

2. On September 15, 1952, plaintiff was employed by defendant Southern Pacific Company as a yardman in a switching crew which was engaged in switching operations in defendant Southern Pacific Company's West Oakland passenger yard in

the City of Oakland, County of Alameda, State of California.

3. At said time and place, a certain passenger car which was being switched by said switching crew was not equipped with a vestibule hand hold on the right side of a vestibule entrance at the B end.

4. At said time and place, plaintiff made claim that he had been injured.

5. At said time and place, plaintiff was earning such sums as were normally earned by a yardman employed by defendant Southern Pacific Company at said time and place, and upon the trial of this action, proof of the exact amount thereof, less deductions required by law, will be made.

II.

Defendant Southern Pacific Company is without knowledge or information sufficient to form a belief as to the truth of the averments of the complaint in respect of plaintiff's conduct and in respect of the existence, nature and extent, if any, of plaintiff's injuries, and in respect of medical services and expenses received and incurred by plaintiff, if any, and in respect of plaintiff's physical condition prior to the happening of the accident averred by plaintiff in his complaint. Defendant Southern Pacific Company denies each and every averment in the complaint except as hereinabove admitted or otherwise denied. Defendant Southern Pacific Company denies the averments of paragraphs I, II, III, IV, V, VI, VII and VIII of the

complaint, except as hereinabove admitted or otherwise denied. Defendant Southern Pacific Company denies that plaintiff has been damaged in the sum of $31,800, or in any lesser sum, or in any sum at all.

As and for a Second, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant Southern Pacific Company here repeats and avers all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length.

II.

Defendant Southern Pacific Company is informed and believes and upon such ground avers that at said time and place and on said occasion, plaintiff was negligent in the premises and in those matters mentioned in the complaint; negligently conducted himself in and about and in respect of said West Oakland passenger yard, said passenger car, and said vestibule entrance of said passenger car; negligently conducted himself in and about and in respect of the side of said passenger car mentioned in the complaint; and negligently performed his duties as a yardman at the time and place and on the occasion mentioned in the complaint, with the result that he was injured. Said conduct of plaintiff, are aforesaid, proximately caused and con-

tributed to the accident averred in the complaint; to the injuries, if any there were, suffered by plaintiff; and to the damages, if any there were, averred by plaintiff.

As and for a Third, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant Southern Pacific Company here repeats and avers all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length.

II.

Defendant Southern Pacific Company is informed and believes and upon such ground avers that at said time and place and on said occasion, plaintiff was negligent in the premises and in those matters mentioned in the complaint; negligently conducted himself in and about and in respect of said West Oakland passenger yard, said passenger car, and said vestibule entrance of said passenger car; negligently conducted himself in and about and in respect of the side of said passenger car mentioned in the complaint; and negligently performed his duties as a yardman at the time and place and on the occasion mentioned in the complaint, with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause and the sole

proximate cause of the accident averred in the complaint; of the injuries, if any there were, suffered by plaintiff; and of the damages, if any there were, averred by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that defendant Southern Pacific Company have judgment for its costs of suit incurred herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 7, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff, and assess the damages against the Defendant in the sum of Twenty-Three Thousand and Fifty Dollars ($23,050.00).

/s/ JOHN JOSEPH BONALANZA,
Foreman

[Endorsed]: Filed November 23, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33,178—Civil

JOHN BLAZIN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on November 22, 1954, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Jesse Nichols, Esq., appearing as attorney for the plaintiff, and Michael Mesner, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on November 22 and 23, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz:

"We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Twenty-three Thousand and Fifty Dollars ($23,050.00). John Joseph Bonalanza, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Twenty-three Thousand Fifty and No/100 ($23,050.00), together with his costs herein expended taxed at $91.80.

Dated: November 24, 1954.

C. W. CALBREATH,
Clerk
/s/ By MARGARET BLAIR,
Deputy Clerk

[Endorsed]: Entered and Filed November 24, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named and His Attorneys:

You Are Hereby Notified that on Monday, the 13th day of December, 1954, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, or at such time as the Court may fix, if it do fix another time, the defendant Southern Pacific Company, a corporation, by its attorneys, will move the above entitled Court, the Division thereof presided over by Honorable Edward P. Murphy, a Judge of said Court, at the courtroom of said Court and Division, United States

Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

1. For an order agreeable to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting the defendant Southern Pacific Company a new trial. Attached hereto, marked "Exhibit A" and herein incorporated is a draft of the order which defendant proposes.

2. Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial, including the charge and instruction of the Court and the ruling of the Court on the instructions.

3. Said motion will be made upon the following grounds and each of them severally:

(a) The verdict is against the law.

(b) The verdict is against the weight of the evidence.

(c) The verdict is contrary to the evidence.

(d) The evidence is insufficient to sustain the verdict.

(e) The verdict is excessive.

(f) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive

the verdict is contrary to the evidence and to the weight thereof.

(g) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(h) Errors of the law occurring at the trial and duly objected and excepted to and particularly in the giving of instructions, to which defendant objected and excepted, and rulings upon the admission of evidence, said instructions and rulings withdrew certain issues from the consideration of the jury.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant

EXHIBIT "A"

ORDER

Southern Pacific Company, a corporation, having duly moved the above entitled Court to vacate and set aside the verdict and judgment herein and grant to said defendant Southern Pacific Company, a corporation, a new trial, and the matter having been heard and submitted to the Court, and all of the parties having appeared upon the making and hearing of said motion, and the Court having considered the same and being advised in the premises, it is

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby, vacated and set aside and a new trial of this action

is hereby granted to defendant Southern Pacific Company, a corporation.

Done in open court this.....day of....., 1954.

....., United States District Judge

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 2, 1954.

[Title of District Court and Cause.]

ORDER

Defendant moves for a new trial on two grounds:

1. Excessiveness of the Verdict.

I recognize that the trial judge is not a mere arbiter but the question of the amount of damage is primarily for the jury. While the amount of the verdict may be relatively large, it is not so large as to shock the court's conscience or sense of justice. It will not be set aside.

2. Applicability of the Safety Appliance Act.

At the close of all the evidence, I took from the jury the question of the applicability of the Safety Appliance Act and instructed that if the admitted absence of the grabiron caused the plaintiff's injury, the jury should find for the plaintiff. During the course of the trial I excluded certain evidence, but I believe that the defendant presented the crux of its case on this point, perhaps in not as dramatic or full sense as it desired, but the skeleton was

clearly defined. Defendant contends the instruction was error.

Viewing the evidence most favorably to the defendant, it shows this. The car Charlottesville was not equipped with a right-hand grabiron which is customarily used by yard men to support them when bending over to uncouple cars. The Charlottesville had been on a track in the Railroad's switching yard that is used both for storage and repair. It had been there "out of service" for some 13 days prior to the accident. A bad order tag had not been placed on the car, but it had undergone some minor electrical repairs unrelated to the missing grabiron. In the course of switching the Charlottesville from this track to the heavy repair track, the plaintiff, a member of the yard crew, was injured while uncoupling the Charlottesville from a string of cars. The Charlottesville and the other cars were moving at the time of the injury. It was to be uncoupled from the rest and carried by its momentum to the heavy repair track.

I held that under those facts Section 4 of the Safety Appliance Act (45 USCA sec. 4) applied as a matter of law. Section 4 provides in pertinent part:

> "* * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." (Emphasis added.)

The defendant contends that there was evidence from which the jury might find that the Charlottesville was not "in use". The argument must be that it was not "in use in interstate commerce". The defendant interprets these words to mean that if the car was out of service and undergoing repairs even though being moved incident to repair it is not "in use".

It is quite clear that when a car is withdrawn from service, at rest and in the process of repair, the Safety Appliance Act does not apply. New York C. & St. L. R. Co. vs. Kelly, 70 F.2d 548 (7th Cir. 1934); Sherry vs. Baltimore & Ohio R. Co., 30 F.2d 487 (6th Cir. 1929); Baltimore & Ohio R. Co. vs. Hooven, 297 Fed. 919 (6th Cir. 1924); Netzer vs. Northern Pac. Ry. Co., 57 N.W. 2d 247 (Minn. 1953); See the Boiler Inspection Act cases: Tisneros vs. Chicago & N. W. Ry. Co., 197 F.2d 466 (7th Cir. 1952); Lyle vs. Atchison T. & S. F. Ry. Co., 177 F.2d 221 (7th Cir. 1949); Compton vs. Southern Pac. Co., 70 C.A. 2d 267, 161 P. 2d 40 (1st Dist. 1945).

This is highly sensible. If the carrier is to comply with the Act, defective equipment must be repaired. On the other hand, the Act is designed to protect railroad employees. These conflicting interests must be reconciled. The statute itself makes a start. If a car which has been properly equipped, but becomes defective while being used on the carrier's line and is in the process of being hauled from the place where the "equipment was first discovered to be de-

fective * * * to the nearest available point where such can be repaired" the criminal penalties provided by the Act do not apply, but the Act does apply in civil actions. (45 USCA sec. 13).

It is in the middle area, between these two points, where the difficulties arise. First the statute—Section 4 sets up a specific requirement for grabirons "for greater security to men in coupling and uncoupling cars". The applicability here differs from that of other sections of the Act which apply to "use on its lines" (45 USCA secs. 11, 23) or "used in moving interstate traffic" (45 USCA secs. 1, 2, 17) or "used in interstate traffic" (45 USCA 5). Use on the line or in moving traffic is certainly more restrictive in application than use in interstate commerce. See Compton vs. Southern Pacific Co., 70 C.A. 2d 267, 161 Pac. 2d 40 (1st Dist. 1945). This car was in use in interstate commerce in a constitutional sense. The lack of a grabiron here caused an injury during the very operation—uncoupling—which the requirement of a grabiron was specifically designed to cover. The defendant would read the statute:

> "* * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars unless the coupling or uncoupling is done incident to switching the car from one repair point to another". (Emphasis added.)

Even though the defendant superimposes these

words on the words "to use in interstate commerce", I do not believe that this section of the Act was meant to be so restricted.

Merely taking the car "out of service" for the purpose of making repairs does not make the Act inapplicable. Texas and Pacific Railway vs. Rigsby, 241 U.S. 33, 36 Sup. Ct. Rep. 482 (1916). In Rigsby, a defective car had been placed out of service marked with a "bad order" tag and was waiting on a spur track for some days. The repair shops were on the opposite side of the main track from the spur track. A member of the yard crew was injured while the defective car was being switched with some other "bad order" cars to the main track preparatory to switching them to the repair shops.

The critical question here is whether Section 4 of the Act applies in switching a car removed from service, from a spur track, where minor repairs unrelated to the defect which caused the injury are made, to another place of repair. The cases, in their language at least, make the question of whether the car has reached the repair point as determinative of the applicability of the Act. If it has they say the Act is inapplicable. If it has not but is rather "in the process of being removed to the repair point", the Act is applicable. But these cases uniformly discuss the problem in relation to Section 11 of the Act which is applicable where a carrier "haul[s] or permit[s] to be hauled or used on its line" a defective car. Even Kaminski vs. Chicago M. St. P. & P. R. Co., 180 Minn. 519, 231

N. W. 189 (1930) which involves a defective grab-iron used in uncoupling cars talks as if Section 11 were the applicable section.

It may be that a car on a repair track for the purpose of repairs or in a yard used exclusively for repair is not "used on its line" but this is a wholly different thing from whether such a car is in "use in interstate commerce".

In any event, these cases, with the possible exception of the Minnesota case—Kaminski, do not cover the situation before me. The factual situation here differs from Rigsby in that there no repairs had been made on the spur. Is this critical?

Some federal courts have read Rigsby as based on the theory that intermediate shifting at the repair point yard is part of a unitary journey to the precise point of actual repair and therefore within Section 13 which would make the Act applicable in civil actions. M'Calmont vs. Penn. R. R. 283 Fed. 736 (6th Cir. 1922); Sherry vs. Baltimore & Ohio R. R. Co., 30 F. 2d 487 (6th Cir. 1929).

Other courts have placed the repair point at a yard devoted exclusively for repairs (Kaminski vs. Chicago, etc., R. R. Co., supra) or at the point where it is taken out of service and placed on tracks used exclusively for repairs. (New York C. & St. L. R. Co. vs. Kelly, 70 F. 2d 548 (7th Cir. 1934). The Kelly case says that "mere shifting of cars within the place of repair" does not put the car in use. But in Kelly the car was not being moved at the time of the injury. In Kaminski the

injury occurred because of a defective grabiron while the cars were being switched in a yard devoted exclusively to repairs.

The defendant reads Rigsby as a case in which the cars had not yet reached the repair point. For this purpose he gives the repair point a restricted meaning. There the cars were on the spur track for the sole purpose of waiting to go to the shop. They had been withdrawn from service. For the purposes of this case the defendant reads repair point broadly. Here, he says, the car reached the repair point when it was placed out of service and minor electrical repairs were performed on a siding used both for repair and storage in a yard which is actively used in making up trains for interstate service. By his argument, the result in Rigsby would be different had some minor repairs unrelated to the defect which caused the injury been made on the spur track.

I do not believe that the result depends upon such a quibble entirely unrelated to the injury or to the repair of the defective part which caused it. Even if we carry this repair point analogy to the bitter end, the track where the electrical repairs were made might be the repair point with regard to those repairs but it certainly was not the repair point for the defective grabiron. The Charlottesville was at the time of injury being taken to the grabiron repair point. Although in Kaminski the cars were in a yard devoted entirely to repair, that case may be contrary. I am not bound by it. As I

view it, section 4 was designed to protect yard men in just such an operation as this. The car was in use in interstate commerce even though being switched to the heavy repair track. That it may not have been in use in moving interstate traffic or in use on the carrier's line is immaterial. The Act applies as a matter of law.

It is ordered that the motion for a new trial be and is hereby denied.

Dated: December 29th, 1954.

/s/ EDWARD P. MURPHY,
United States District Judge

[Endorsed]: Filed December 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Southern Pacific Company, a corporation, defendant in the above entitled action, deeming itself aggrieved by the judgment in the above entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of November 23, 1954, herein, and the judgment stamped filed on the 24th day of November, 1954,

in the office of the Clerk of the above entitled District Court.

Dated: January 24, 1955.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant and Appellant, Southern Pacific Company, a Corporation.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, Southern Pacific Company, a corporation, defendant in the above-entitled action, is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled action in the above-named United States District Court on the 24th day of November, 1954, in favor of John Blazin, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Twenty Three Thousand and Fifty Dollars ($23,050) and costs of suit, and from the whole of said judgment; and

Whereas, said appellant is desirous of staying execution of said judgment so to be appealed from;

Now, Therefore, Indemnity Insurance Company of North America, a corporation duly incorporated

under the laws of the State of Pennsylvania, for the purpose of making, guaranteeing, and becoming surety on bonds and undertakings and having complied with all of the requirements of the State of California respecting such corporations, does hereby, in consideration of the premises, undertake and promise, and does hereby acknowledge itself bound, in the sum of Thirty Thousand Dollars ($30,000), being in excess of the whole amount of the judgment, costs on appeal, interest, and damages for delay, that if the said judgment appealed from, or any part thereof, be affirmed or modified or if the appeal be dismissed, the appellant will pay and satisfy in full the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all costs, interest and damages which may be awarded against the appellant upon said appeal, and that if appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit, or from such other court as may and shall lawfully issue the remittitur in the Court from which the appeal is taken, viz., in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of Respondent, John Blazin, and without notice to said Indemnity Insurance Company of North America, a corporation, in his favor against the undersigned surety for such amount, together with interest that may be due thereon and the dam-

ages and costs which may be awarded against said appellant upon such appeal.

In Witness Whereof, the said Indemnity Insurance Company of North America, a corporation, has caused this obligation to be signed by its duly authorized attorney-in-fact and its corporate seal to be thereunto affixed at San Francisco, California, this 21st day of January, 1955.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

/s/ By GEORGE F. HAGG,
Its Attorney-in-Fact

Approved:

/s/ EDWARD P. MURPHY,
United States District Judge

Notary Public's Certificate attached.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Southern Pacific Company, a corporation, defendant in the above entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the judgment in said action, hereby designates for inclusion in the record on appeal all of the record and records, proceedings and evidence in the above entitled matter.

Without restricting the foregoing, there is hereby

designated for inclusion in the record on appeal all of the matters referred to in Rule 75(g) of the Rules of Civil Procedure and a complete Reporter's Transcript of all proceedings, including, but not restricted to, opening statements of counsel, evidence offered and received, instructions to the jury, defendant's objections and exceptions to the charge to the jury and all proceedings on motion for new trial including the order and opinion denying that motion, and all of the papers and proceedings to the end that there shall be included therein the complete record and all of the evidence and proceedings in the action.

Dated: January 28, 1955.

/s/ A. B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 28, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they

constitute the Record on Appeal herein, as designated by the Appellant:

Complaint.

Answer.

Deposition of John Blazin.

Verdict.

Judgment on Verdict.

Notice of Motion for New Trial.

Order Denying Motion for New Trial.

Reporter's Transcript of Proceedings, Nov. 22, 1954.

Reporter's Transcript of Proceedings, Nov. 23, 1954.

Reporter's Transcript of Conclusion of Proceedings, Nov. 23, 1954.

Notice of Appeal.

Supersedeas Bond.

Appellant's Designation of Record on Appeal.

Plaintiff's Exhibit 1.

Defendant's Exhibits A, B, C, D, E, F, G, H and I.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 2nd day of March, 1955.

[Seal] C. W. CALBREATH,
Clerk

/s/ By C. M. TAYLOR,
Deputy Clerk

In the District Court of the United States, Northern District of California, Southern Division

No. 33178

JOHN BLAZIN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Monday, November 22, 1954

Before: Hon. Edward P. Murphy, Judge.

Appearances: For the Plaintiff: Nichols, Richard, Allard & Williams, by Jesse Nichols. For the Defendant: Dunne, Dunne & Phelps, by M. H. Messner.

(A jury was duly empaneled and sworn.) [1*]

The Court: Mr. Nichols, did you have a motion which you wish to take up in the absence of the jury.

Mr. Nichols: Yes, Your Honor, I have a motion I want to take up out of the presence of the jury.

The Court: You may be excused for a few minutes, ladies and gentlemen. You may retire to the jury room.

(Jurors excused.)

Mr. Nichols: Your Honor, at this time I am going to move to strike the defense that has been

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

pleaded of contributory negligence. This action, as alleged in our complaint, the only cause of action alleged is the failure of the defendant company to maintain a grabiron and that the grabiron was missing, which was clearly an action under the Federal Safety Appliance Act, and under the section and under the cases an employee cannot be charged with contributory negligence in the event of an accident in his behalf brought under that section.

Mr. Messner: We have no objection to that, Your Honor, with the understanding that this is not an action under the Federal Employers' Liability Act, but is limited to the Safety Appliance Act.

Mr. Nichols: That is right, Your Honor, the cause of action as pleaded. [3]

The Court: That may be dismissed.

Mr. Nichols: Thank you.

The Court: Well, suppose we—I don't like to send the jury out and bring them right back, so we will take five minutes.

(Short recess.)

The Court: You may proceed.

(The following proceedings were had in the presence of the jury.)

Opening Statement on Behalf of the Plaintiff

Mr. Nichols: Ladies and gentlemen: I will make a brief statement to you of what the evidence will disclose in this case. As was indicated by His Honor

in the statement he made, Mr. Blazin was an employee and had been for some time for the Southern Pacific Company in a switching crew. There is a distinction between a man who works in interstate commerce and those that don't. The evidence will disclose—I think it will be admitted—that he was engaged in transportation work that involved cars that went all over the United States, and under that set of circumstances there is no Workmen's Compensation Act, as we know it here in California. The act is one that—the act which permits this action is a federal act and it's principally the Safety Appliance Act which provides in railroad equipment the railroad has a very definite standard that they must meet. [4] The evidence will disclose it is required that all vestibule cars have what we call grabirons.

The happening of this accident is one that is easy to relate. It occurred in September of 1952. I have placed on the board over here—it is rather roughly drawn and doesn't indicate the exact manner in which these tracks operate; if there is any criticism of the tracks themselves it will be laid to me in the manner in which I have placed it on the board—but over in Oakland at the Southern Pacific yards they have an old mainline track, and then they have another track that feeds off into a number of—not feeder tracks, but tracks where they permit the cars to remain when not in use. Storage tracks, I think they are called.

The evidence will disclose in this case that the crew that Mr. Blazin was working on were dis-

tributing cars throughout that yard, and on the day that the accident happened, they had taken a car, I believe this will be the evidence, out of what they call the 34 lead, and they brought the car out on this line and were going to send it down into the 28 lead. I may be inaccurate by numbers—we have the gentleman here; it can be accurately disclosed to you.

Mr. Blazin's task that day would be to cut the car, I think it was a passenger car, when they pulled the car out of the 34 lead and got out on that track the engineer would reverse his motion and send the locomotive forward with this car in [5] front of it and at a certain speed, why, the car would be cut loose and would go down into this 28 track.

We expect to show this: that under the rules of the company in the event there is a defect in a car it should immediately be posted and a sign placed on——

Mr. Messner: Just a moment. If the Court please, in view of the stipulation this is not a case that is proceeding on the theory of negligence. I don't think that is important.

The Court: I think you are right, counsel.

Mr. Nichols: We will expect to show that there was no indication other than it was a normal car, that the normal car requires on each stairway two grabirons, and it is a matter of great importance to these men, because in swinging on and off they have to be watching the signal man and can't be looking to see if everything is in place.

The evidence will disclose as Mr. Blazin got onto the car, just as he got onto the car it started, and he swung on with his left hand, and he was swinging over to get the right grabiron. In the event he had firmly affixed himself to the right grabiron he then had his left hand free, he would have reached down and done the cutting off that was necessary. But it just happened there was no right grabiron, and as the law requires one to be, and as a result he lost his balance and was swung around and hit by the side of the car.

It was one of those injuries that at the moment did not [6] appear to be too severe to him, although he was in a very short space of time. He reported it to the company and made a report of the accident, and made a report of the absence of this iron, this grabiron, and obtained some very temporary medical care that day.

He worked for a period of two days, and by that time his back, in the lower back his injuries had become so severe that he was off, I think, approximately two months and he had a period of time he was working in a great deal of pain in his back, that bothered him when stooping, and some period of time following that endeavoring to do his job one of the things he should have been able to do, the back flared up and he was off again.

He had a hernia that developed as a result of this accident.

We expect to show that he has had a salary loss somewhat in the neighborhood of $2500, maybe more than that. He was making about $430 a month with-

out taking out his deductions. He had been a man regularly employed, had a good record with the company.

Since that time he has had a great deal of difficulty with his back and he is still having difficulty. We have the hospital records; he has gone to the hospital on numerous occasions, and we will make that information available to you.

The Court: Do you desire to make your statement now? [7]

Mr. Messner: The defendant would like to reserve its statement.

The Court: You may do so.

Call your first witness.

Mr. Nichols: For the purpose of the record, we subpoenaed the hospital librarian, and she brought these records. As I understand it from counsel, they can be admitted, and subject to any—if there is some material that may not be material, we can point it out to the Court and secure the Court's ruling. I ask that the records be admitted and marked appropriately.

Mr. Messner: Satisfactory, Your Honor.

The Court: Very well, admitted.

Mr. Messner: At this time I would like to have an order excluding witnesses.

(Whereupon the hospital records referred to above were received in evidence and marked Plaintiff's Exhibit No. 1.)

The Court: All witnesses in the trial of this case will remain outside in the office of the Bailiff until such time as they are called by him.

JOHN BLAZIN

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [8]

The Clerk: Please state your name and occupation for the record.

The Witness: John Blazin. I am a yardman for the Southern Pacific Company.

Direct Examination

Mr. Nichols: Q. Mr. Blazin, how old are you?

A. 29 years old.

Q. Are you married? A. Yes.

Q. Family?

Mr. Messner: Just a moment. Your Honor, I will object to marital status; isn't important.

The Court: I think the background of the witness is always material. I don't see that it would cause any harm to establish marital status. Overruled.

Mr. Nichols: Q. When did you first become employed by the Southern Pacific Company?

A. In 1942.

Q. And at that time what type of work were you doing for them?

A. I was a laborer and an engine watchman.

Q. Keep your voice up.

A. I was a laborer and an engine watchman.

Q. Were you at that time going to school?

A. Yes.

Q. And following—how long a period were you

(Testimony of John Blazin.)

continuously [9] employed by the company at that time? A. Approximately eight months.

Q. All right. Then after getting out—incidentally, how far did you go in school?

A. I graduated from high school.

Q. You graduated from high school?

A. That's right.

Q. Following your graduation from high school, when was it that you went back to work for the railroad company? A. In May of 1946.

Q. And in what capacity were you employed by the company then?

A. As a yardman—as a clerk, excuse me.

Q. And a clerk employed where?

A. In West Oakland yards.

Q. And was it work that kept you in the yards or work that kept you in the office?

A. Partially in the yards and partially in the office.

Q. And how long did you do clerical work?

A. Approximately three weeks.

Q. And then just tell the ladies and gentlemen what you did.

A. Then I transferred to the switching, I made a recommendation if I could change and I was accepted, and I changed as a yardman.

Q. Mr. Blazin, it is difficult to hear you. Keep your voice [10] loud so we can all hear you.

And from 1946 on were you employed by any other company other than the Southern Pacific Company? A. No, I wasn't.

(Testimony of John Blazin.)

Q. And was your employment continuous during that time? A. Yes, sir.

Q. Except for illness, your throat, and that sort of thing, had you had any serious ailment as far as you knew prior to the time this accident occurred? A. No.

Q. You had some time off on occasions over that period of six years where you had a throat difficulty, did you?

A. That's right. I had an appendicitis operation and had a virus.

Q. How long, about, would you say had been the longest you had been required to be away from work because of illness during 1946 up to 1952?

A. Approximately about a month.

Q. Now in 1952, the day that we are going to discuss your activities—your activities on that day, rather, September 15th, will you tell us what crew you were assigned to?

A. I was assigned to a yard crew in the West Oakland passenger yard. The foreman on the job was Don Gay, and the other helper was Mr. Moultin, with an engineer and fireman.

Q. Now, what were your duties—first of all, what was the [11] crew doing?

A. Our duties was to make up passenger trains and to break up the trains as they came in.

Q. And that took cars that went all over the United States? A. That's right.

Q. When this accident occurred, what were you doing?

(Testimony of John Blazin.)

A. I was in the position of cutting off a car that we was going to throw out of the storage track.

Q. That means something to railroad men, but actually, so that the ladies and gentlemen will know, were you making up a train or were you breaking up a train?

A. We were just throwing a car out of the storage track.

Q. Now, there are over in Oakland a number of tracks called storage tracks?

A. Yes, sir.

Q. And when a Pullman car is not in use is that where it is placed? A. That's right.

Q. And from what track were you taking this particular car?

A. We were taking it out of 34 track and we were going to throw it up the 28 lead.

Q. I have placed on the board, and I know it is very crudely done—is there an old mainline track that would be somewhere in the neighborhood as indicated here (indicating on the blackboard)? [12]

A. Yes, sir.

Q. Then is there a track that goes off of that that leads into these various leads?

A. That is right.

Q. And leads into these storage tracks?

A. Yes, sir.

Q. And disregarding the angle, would 28 track be in about the same relative position that I have, say, to 34 here? A. Yes, sir.

(Testimony of John Blazin.)

Q. And which way do those tracks extend, do you know? Is that north or south or——

A. I imagine it would be north and south.

Q. You mean north would be the top?

A. No, that would be the south.

Q. North would be down here (indicating)?

A. That's right.

Q. West would be in this direction, then, wouldn't it (indicating)? A. Yes, sir.

Q. So that was there more than one passenger car attached to the locomotive?

A. I believe there were eight passenger cars attached.

Q. And where was the—you remember the name of this car that the accident happened on?

A. The Charlotteville. [13]

Q. Charlotteville. And where was the Charlotteville in that group of eight?

A. It would be on the opposite end of the engine. In other words, it would be on the western—in the track it would be on the southern end of the track.

Q. I see. So that the operation then called for the locomotive to push the number of cars down into 34 where you hooked on to the Charlotteville and brought it out over to this track, is that right?

A. Usually the cars were stored in the track and we went in with the engine and hooked on to these cars.

Q. All eight cars were on the 34 track?

A. That's right.

Q. And what is the track called, so that we can

(Testimony of John Blazin.)

use the proper name, the track that extends along this fashion (indicating)?

A. That is just the lead.

Q. The lead track? A. Just the lead.

Q. Now, when the car, when the locomotive went down into 34 track, what position were you in?

A. I was following the engine; I tied the engine on to these cars.

Q. And did the engine go down with the—did it go down into that lead 34 track, rear end being the lead, or the front [14] end the leading part?

A. The front end was the lead part.

Q. So that the engineer was on what side then?

A. It would be on the north side, or the right side going into the track.

Q. And after you made the attachment the engine pulled on out and pulled out in this direction, is that right (indicating)?

A. That's right.

Q. Now, what position did you take?

A. I was standing on the lead as the cars were being pulled out.

Q. And was the Charlottesville the only car that was going to be let go of down into 28 track?

A. Yes, sir.

Q. When did you first learn that?

A. As the cars pulled out on the lead and I was watching the foreman. He gave me a sign to let one car go.

Q. Could you tell us about where you were standing, Mr. Blazin?

(Testimony of John Blazin.)

A. I was standing about where the curve is there, where the two tracks separate (counsel indicating on the blackboard.)

That would be farther to your left there.

Q. Up here (indicating)?

A. That's right.

Mr. Messner: Mark that? [15]

Mr. Nichols: I can mark that.

Q. Will you tell me when (indicating)?

A. Right about there.

Q. Call it B-1. Now, is that the position, the approximate position that in the type of work you were doing you should have been located?

A. That's the position I should have been in.

Q. And what type of signal, if any, did you get as to what you were going to do?

A. When the cars stopped, the foreman—I was watching the foreman—he gave me a signal to let one car go, which would be just a clap of the hands, to let one car go.

Q. Where was the foreman?

A. He was approximately by 32 switch, in between 32 and 34 switch.

Q. Down in this area (indicating)?

A. That's right.

Q. That is B-2; that is where the foreman was located.

Now, Mr. Blazin, would you tell the ladies and gentlemen the approximate distance that would be in feet actually on the ground?

A. Approximately 100 to 120 feet.

(Testimony of John Blazin.)

Q. This accident occurred during daylight?

A. Yes, sir.

Q. At about what time? [16]

A. At about eleven o'clock in the morning.

Q. And when—incidentally, who was the foreman? A. Don C. Gay.

Q. Gaile? A. Gay, G-a-y.

Q. Now, when he gave the signal had the cars come to a stop? A. They had.

Q. And would the position that you had occupied be one that you would be—supposed to wait until you got a signal as to what you were to do?

A. That's right.

Q. How was the signal given?

A. As I was walking towards him he just clapped his hands. That is the signal for one car.

Q. What did that indicate to you, then?

A. To get aboard this car and cut it off when he gave the proper signal.

Q. Now, which end of the car would you get off on, get—alight, board, rather?

A. Where the two cars would be connected together. In other words, it would be on the east end of the car.

Q. Almost the length of the car between you and the other end of it? A. That's right.

Q. And what opening does the car have? [17]

A. They have a vestibule with steps.

Q. And are you familiar with the requirement as to grabirons? A. Yes, sir.

Q. And what is the requirement?

(Testimony of John Blazin.)

A. There is to be a grabiron at the left and the right portion of the steps in order to help you board the car.

Q. Now, what coloring was the car?

A. I believe it was a dark green.

Q. As distinguished from the streamlined cars?

A. That's right. It would be a dark green.

Q. Were the stairways open? Were the stairs down and open? A. Yes, sir.

Q. When you received a signal what did you do?

A. I got on the car—I started to board the car and I grabbed hold of the left handhold and swung my feet. As I was swinging on the car, the cars began to move and I reached for the right hand handhold, and it was missing, and I hit the ground with my feet, hanging on with my left hand and started swinging between the two cars and just as I was swinging in between, before my hand outstretched, I was hit on the back by the second Pullman and knocked out and away from the cars on the ground.

Q. Is the location of where the grabirons are to be fixed—in other words, do you always find them in the same spot?

A. They are in the same spot on those particular cars.

Q. And what is the coloring? [18]

A. The grabirons and the cars blend in together. I believe they are the same color.

Q. In doing the operation that you were doing,

(Testimony of John Blazin.)

would it have been necessary for you to grab both grabirons at the same time? A. Yes, sir.

Q. And had there been two grabirons there, what would have been the thing that you would have done?

A. I would have reached with my right hand for the right grabiron and released my hand with the left hand in order to grab the cutting lever to leave the car go.

Q. Well, there again, where is the cutting lever?

A. It is below alongside of the steps. It is below the left grabiron in between the cars.

Q. Did you reach around the side of the car to do that?

A. That is right, you reach around the side in order to pull the cutting lever.

Q. Was the train actually in motion when you made your grab for the right iron?

A. It had just started its motion.

Q. Any knowledge at all of the absence of the grabiron? A. No, sir.

Q. When you were struck by the second car, what portion of your body was struck?

A. I was struck down the center of the back, all the way up to my head with the corner of the car. [19]

Q. Did you experience any pain then?

A. I was shocked, I didn't know exactly what had happened. I didn't realize, even after I was down on the ground, I couldn't realize what happened.

(Testimony of John Blazin.)

Q. And ultimately did you continue on that day with some of your work?

A. Well, after I got up I moved around a little bit and I continued with the work for about an hour, and then my back began to stiffen and pain, so I saw the doctor.

Q. And where was the doctor?

A. In the Southern Pacific Emergency Hospital in West Oakland.

Q. Who is that doctor?

A. Dr. Stromberg.

Q. And what if anything did he do for you?

A. Well, he talked to me and he says it would bother me more in three or four days, and he gave me an analgesic balm to apply.

Mr. Messner: That is objected to——

The Court: Don't tell us what the doctor told you. He may answer.

A. (Continuing) Some analgesic balm.

Mr. Nichols: Q. Did you finish out the day?

A. Yes, sir.

Q. On the following day what happened?

A. I returned to work and I worked the whole shift, although [20] I had pain in my back and I returned to the hospital and was given more of the analgesic balm.

Q. And where was that applied?

A. To my back.

Q. Did you get relief from it?

A. For a while. There was an awful lot of heat,

(Testimony of John Blazin.)

bit.

Q. Were you free from pain on the day after the accident? A. No, sir.

Q. Just tell His Honor and the ladies and gentlemen the next day what happened.

A. I worked, I believe, for two days, possibly three, following the accident, and I saw that I wasn't getting any relief, so I went to see another doctor for treatment.

Q. Who was that doctor?

A. That was Dr. Gates.

Q. Is he a Southern Pacific doctor—was he then?

A. Yes, he was a Southern Pacific doctor.

Q. What did he do for you?

A. He gave me diathermy treatments for about two months off and on.

Q. Did you go to the hospital at all during that time?

A. Not until about a month after the accident, why, Dr. Gates sent me to the hospital for X-rays.

Q. That was the Southern Pacific? [21]

A. That's right.

Q. Were you just in and out the same day?

A. Yes, sir.

Q. Now, what did Dr. Gates do for you during that time?

A. Well, he gave me the diathermy treatments. That was about the only treatments, I believe; he gave me some pills.

(Testimony of John Blazin.)

Q. Were you taking any treatment?

A. I was taking hot baths; I had a heat lamp that I used, and I used the analgesic balm and with rubdowns, my wife gave me rubdowns.

Q. Then how long was it before you returned to work?

A. I believe I returned to work about the 17th or 18th of November 1952.

Q. Now, what was your salary? What were you regularly receiving for your services?

A. Approximately $430 a month.

Q. And they made some deductions for railroad retirement, did they? A. Yes, sir.

Q. And for income tax?

A. Income tax and for the Southern Pacific Hospital.

Q. And you think that your gross was how much? A. About $430 a month.

Q. And your take-home pay was about how much?

A. Probably about $350, something like that.

Q. You were away from work then from September 18 to about November——

A. 18, 1952.

Q. When you returned to work were you free from pain then?

A. No, sir, I still had the pain.

Q. Were you wearing any appliance of any kind? A. No, I was not.

Q. Were you taking any diathermy at that time?

(Testimony of John Blazin.)

A. After I returned to work I was taking my treatments at home, I had my heat lamps and hot baths, and hot baths along with the different types of treatment that I had.

Q. Now, just tell us what you did and how you worked and what happened.

A. I worked on and off from November 1952 until September of 1953, and then September of 1953, while throwing the switch my back tightened up on me again.

Q. Now, during that time were you ever free from pain? A. No, sir.

Q. Were you able to do the work the way you had prior to the accident of September 15?

A. I tried to do the work the best I could. I don't know if I did it as could; I don't believe I did it as good as I did before, but I tried to do the best I could.

Q. Well, were you limited at all in what you could do?

A. I had to be awfully careful that I didn't do any lifting [23] or jerk my body or twist my body in any way.

Q. What would happen when that would occur?

A. Then I would get terrific pain in my back.

Q. Was your back during that time, was there ever a time when you were completely free from pain in the back?

A. There were times when I had less pain; there were times when the pain was more severe.

Q. Now, during those periods from, say, Novem-

(Testimony of John Blazin.)

ber 1952 up until September 1953, were you seeing any doctor? A. No, sir.

Q. Now, you say you had something that happened in 1953 where your back tightened up?

A. That's right, in the process of throwing a switch my back tightened up.

Q. Throwing a switch—would that be part of the work you should be able to do?

A. Yes, sir.

Q. Nothing wrong with the switch, was there?

A. Not that I know of.

Q. In other words, it was a normal part of your job? A. That's right.

Q. And what happened?

A. It was near quitting time and we were allowed to tie up early. I went in and saw a doctor in San Leandro.

Q. What doctor was that? [24]

A. I believe his name is Stepman. He is an S. P. doctor.

Q. Did you give him a history of the original accident? A. Yes, sir.

Q. What if anything did he do for you?

A. He gave me some pills for muscle spasm, and pain pills, I believe they were.

Q. And did you lay off, then?

A. The following day I went back to him and he gave me a slip to go to the Southern Pacific Hospital.

Q. Did he make an examination of you?

A. No, no examination.

(Testimony of John Blazin.)

Q. What if anything did they do at the Southern Pacific Hospital?

A. They took X-rays, gave me different types of treatment, diathermy, different pills and drugs, together along with it—you mean all the treatment?

Q. Yes.

A. I have had novocain in my back and shoulders, and I have had X-ray radiation treatments, and they lasted about two weeks, and some kind of a spray that they spray on your back that is supposed to relieve muscle tension, and I have had heat and massage along with the diathermy.

Q. At some time did you have some difficulty with respect to a hernia? A. Yes, sir. [25]

Q. Just tell us about that.

A. I believe it was in May of 1953 that I got off of a car, and in getting off this particular car I felt sort of—well, it wasn't a pain, it was tingling, more or less, in my groin. I didn't know what it was, I never made a report—I didn't know just what it was.

Q. Did they ultimately operate on that?

A. They operated on that in December of 1953.

Q. And was that part of the time that you were out from September?

A. Yes, sir, I was still off.

Q. Now, from 1953, September 22, other than on September 8, October 7—withdraw that.

Can you tell us the days, the period of time you lost from September 22, 1953 up to and including February 1 of 1954?

(Testimony of John Blazin.)

A. I believe I worked on the 7th and 8th of October and the 13th and 14th of November, I believe it was.

Q. In other words, you worked four days?

A. That's right.

Q. During that four months?

A. Yes, sir.

Q. And why weren't you able to work?

A. I was taking these treatments from the hospital, and my back was bothering me, and I didn't have a release from the hospital to go to work.

Q. Pardon me?

A. I didn't have a release from the hospital to go to work.

Q. When you go into the hospital for care and treatment of that kind, do you have to have a release before you can go back to work?

A. You have to have a release and o.k. by your supervisor.

Q. And you went back to work then February 1, 1954? A. Yes, sir.

Q. And have you worked continuously since, or have you had any time off?

A. I have worked—I haven't had any great deal of time off, but I have been off and on since February of this year.

Q. And why was that? Why were you off?

A. A different times when I have the pain and headaches that I would get, I would have to be off for two or three days in order to rest up in order to go back to work.

(Testimony of John Blazin.)

Q. At the present time you are still working, are you? A. Yes, sir.

Q. Now, just tell us, Mr. Blazin, in your own words, whether you have any complaints at the present time with respect to your back?

A. I have pain in my lower back, in my shoulders, and in the back portion of my neck.

Q. Is that improving?

A. I don't know if it is improving. I still have the pain. [27] I don't believe that——

Q. Does it increase with work or does it decrease with work? Just tell us about it.

A. Well, as I start the day's work, the longer I work, why, the more pain I do have, and after eight hours, why, I am just about down.

Q. Is the condition improving over what it was, say, in March of this year?

A. Well, I believe it is improving, although I still have an awful lot of pain to contend with.

Q. Are you able to run and do things you did before? A. No, I can't run.

Q. Now, in your home, how large an area do you have where you live?

A. Approximately a half acre.

Q. Prior to the accident who cared for that?

A. I did.

Q. And how was it cared for? For what use would be the half acre land?

A. Oh, I had gardening and fruit trees and different things.

Q. Have you been able to maintain that?

(Testimony of John Blazin.)

A. No, sir.

Q. Are your outside activities limited at all by reason of your back?

A. I don't go to different things that I used. I used to go [28] to dances and I used to play ball and different things like that, which I haven't been able to now.

Q. Have you had some medical expense although you belong to the hospital plan?

A. Yes, sir.

Q. And most of the medical care has been supplied to you by that plan?

A. That is right.

Q. Have you had any other expenses?

A. Yes, sir, I had my own doctor that I had expenses.

Q. How much was that?

A. I don't know how much his expenses are up to the present.

Q. And who is that? A. Dr. Fisher.

Q. Any other expense?

A. I have bought heat lamps and heating pads and different drugs, ointments and liniments, and I have this brace that I had to buy.

Q. How much was the brace?

A. $15, I think.

Q. And how much was your medicines and heat lamp?

A. I think the heat lamp was about $8 and the heating pad, I believe, about five or six; I am not sure.

(Testimony of John Blazin.)

Q. Those were all minor amounts, then?

A. That's right. [29]

Mr. Nichols: I think that is all.

Mr. Messner: Start cross examination?

The Court: You may proceed.

Cross Examination

Mr. Messner: Q. Mr. Blazin, you mentioned some expense in connection with medical care and treatment by your own doctor, is that correct, sir?

A. That's right, sir.

Q. And who did you say that doctor was, sir?

A. Dr. Fisher.

Q. Dr. Fisher. When did you first report to Dr. Fisher? A. I believe in October of 1953.

Q. In October of 1953. And what care and treatment did Dr. Fisher give you?

A. I was requested to have a physical examination by the Southern Pacific Company, and he performed the physical examination.

Q. The Southern Pacific Company sent you to Dr. Fisher to have a physical examination?

A. They asked that I get in contact with an outside doctor and have a physical examination so that they might base a settlement with them.

Q. Now, who in the Southern Pacific Company asked you to go to Dr. Fisher? [30]

A. Mr. Gustafson made a request that I see a doctor.

Q. Isn't it a fact that you went to Mr. Nichols' office and he sent you to Dr. Fisher?

(Testimony of John Blazin.)

A. No, sir, I called Mr. Nichols.

Q. You called Mr. Nichols?

A. I called him and requested if he knew any doctors I might see.

Q. I see. And he suggested to go to Dr. Fisher. Did Dr. Fisher ever at any time give you any treatment?

A. Yes, he has given me treatment.

Q. What treatment is that?

A. He has given me different kinds of exercises, and he has prescribed the brace that I am now wearing.

Q. When did Mr. Fisher first give you any treatment in connection with this injury?

A. Approximately six weeks ago.

Q. About six weeks ago. He first saw you in October 1953? A. That's right.

Q. Had you seen Dr. Fisher between October 1953 and six weeks ago when he first gave you treatment?

A. I saw him once or twice before that; I don't recall the dates of that.

Q. You don't remember when that was?

A. It was in this year.

Q. It was this year? [31]

A. That's right.

Q. Did you go to his office on those occasions or did you see him somewheres else?

A. In his office.

Q. In his office. And did he examine you on

(Testimony of John Blazin.)

those occasions? What happened when you went to his office? A. He examined me.

Q. Examined you? A. That's right.

Q. Did he take X-rays of you?

A. Yes, sir.

Q. When did he first take the X-rays, was that in October of 1953? A. I believe so, yes.

Q. Did he take any X-rays after October 1953?

A. He took X-rays about a week or so ago.

Q. About a week or so ago?

A. That's right.

Q. Now, six weeks ago when you went to Dr. Fisher did you go there for the purpose of an additional examination at that time?

A. And for possible treatment.

Q. And for treatment? A. That's right.

Q. Now, have you been to any doctor other than Dr. Fisher except those doctors at the Southern Pacific General Hospital? [32]

A. No, not outside of the Southern Pacific doctors.

Q. I see. Now, you returned to work, I believe you said, on November 17, 1952, and you said that you worked on and off until September of 1953. That is a period roughly of ten months. Did you go to Dr. Fisher during that time?

A. No, sir.

Q. Did you go to the Southern Pacific General Hospital during that time?

A. I don't recall if I did. I may have gone once or twice, I may not have. I don't recall.

(Testimony of John Blazin.)

Q. You were treated by Dr. Gates during that period of time?

A. No. I believe maybe one treatment, although I am not sure.

Q. When would that have been?

A. I don't really recall.

Q. You don't know whether you went to him or not, is that true?

A. It might be true. I think I did go once, if I am not mistaken.

Q. Well, do you know whether it would have been during 1952 or would it have been during 1953? A. 1953.

Q. It would have been in 1953?

A. Yes, sir.

Q. Now, you said that you worked on and off. Now, would you [33] be good enough to explain to the ladies and gentlemen what you mean by on and off, Mr. Blazin?

A. Well, I did work as regular as I could. Every once in a while I did have a few days, possibly two or three days that I took off and rested off in order to continue my duties.

Q. Mr. Blazin, starting in with November 1952 how many days did you have off on this on and off basis for the balance of November 1952?

A. I don't recall, sir.

Q. How many days in December 1952 were you off on account of this injury?

A. Well, I don't have my time books; possibly two or three days.

(Testimony of John Blazin.)

Q. How many days in January 1953?

Mr. Nichols: Counsel, don't you have that record?

Mr. Messner: Mr. Nichols——

Mr. Nichols: We will take your record for it, whatever it shows.

Mr. Messner: This man has a time book. It seems to me he knew this was coming for a long time. I shall get the time record.

Mr. Nichols: I make no question about it. We don't challenge the correctness of the Southern Pacific record as far as his time.

Mr. Messner: All right, then, I shall get the record. [34]

Q. Now, from November 17, 1952 until September of 1953, did you ever lay off work for any reason other than your physical condition brought about by the accident of September 15, 1952?

A. Oh, I believe I did for personal reasons.

Q. You did lay off for personal reasons. And how many times did you lay off for personal reasons, Mr. Blazin? A. That I don't know.

Q. Do you know in the total amount how much time you took off for personal reasons?

A. No, I don't.

Mr. Nichols: Can you approximate it for him, Mr. Blazin?

The Witness: Oh, maybe ten, fifteen days.

Mr. Messner: Q. That would be the total in the ten months, then, roughly, ten or fifteen days?

A. That is approximate.

Q. Thank you.

Mr. Messner: Take the noon recess now?

The Court: Take the recess now until two o'clock this afternoon, ladies and gentlemen. In the meanwhile, you are admonished not to discuss the case among yourselves or with anyone else, nor to form or express any opinion about the matter until it is finally submitted to you. Two o'clock this afternoon.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [35]

The Court: Proceed.

Mr. Nichols: If there is no objection on the part of the Court, counsel has agreed I can put the doctor, who is here, on the stand now and resume the examination of the plaintiff later.

The Court: All right.

Mr. Nichols: Doctor, will you take the stand?

LLOYD DELBERT FISHER

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name and occupation to the Court and to the jury.

The Witness: Lloyd Delbert Fisher.

Direct Examination

Mr. Nichols: Q. You are a physician and surgeon licensed to practice your profession under the laws of California, are you, Doctor?

A. Yes, sir.

Q. Will you just state to the ladies and gentlemen what training you have had, medical training?

(Testimony of Lloyd Delbert Fisher.)

A. I am a graduate of the University of California Medical [36] School interned at the San Francisco Hospital, and then took a year in general surgery in Baltimore and two years in orthopedic surgery at the University of Virginia Hospital in Charlottesville, and then a year as an instructor in orthopedic surgery at the University of Southern California Medical School in Los Angeles.

Q. And how long have you ben licensed to practice your profession, Doctor?

A. Since 1938.

Q. And do you confine the practice of medicine to any particular field?

A. Yes, I limit my practice to orthopedic surgery.

Q. And that involves just what portion of medicine?

A. That's a specialty in the field of medicine which deals with the musculature, musculo-skeletal system, the bones and joints and muscles and tendons that move them.

Q. And you maintain your offices where?

A. In Oakland, California, 447 29 Street.

Q. Are you on the staff of any of the hospitals in the East Bay?

A. Yes, I am on the staff of the Merritt Hospital, the Providence Hospital, the East Oakland Hospital, Highland and Fairmont Hospitals, and in Berkeley the Herrick Memorial and Alta Bates Hospitals.

Q. Doctor, did you have an occasion to examine

(Testimony of Lloyd Delbert Fisher.)

Mr. John [37] Blazin, who is the plaintiff in this action? A. Yes, sir.

Q. And would you just tell us when and where it was that you first saw him?

A. I first saw him in my office on October 23, 1953.

Q. And at that time did you obtain a history from him with respect to an accident that he had?

A. Yes, I did.

Q. And just tell the ladies and gentlemen what the history was that you had obtained.

A. Well, Mr. Blazin said that—well, he complained principally of pain in his neck, back, upper back and also in his low back, and said that he was injured on September 15, 1952 while employed as a yardman for the Southern Pacific Company. He reached for a grabiron on a moving passenger car which was—but it wasn't there. In other words, the iron was missing. This threw him off balance. He had a grip with his left arm on the grabiron and this swung him to the left, swinging him around so that he struck another passenger car going in the same direction. However, he hung on to the car until he felt he could let go safely.

When he did let go he more or less stumbled and was knocked to the ground. This occurred in the Oakland yard.

About an hour later he saw Dr. Stoneberg, a company doctor, who examined him and gave him some analgesic balm to rub on his [38] back, told him it would probably hurt him for the next two or three

(Testimony of Lloyd Delbert Fisher.)

days. He finished working that day and worked for two days following. He saw the nurse on the two following days and was given a massage to his back.

The fourth day the pain became so severe he laid off work and went to see Dr. Stomberg and had a heat treatment in his office.

Following this he saw Dr. Gates, who was closer to his home. He went to Dr. Gates' office daily for heat treatments for two or three weeks.

About a month after the injury he had X-rays made at the Southern Pacific Hospital in San Francisco. He does not recall the name of the Doctor he saw there, but the X-rays he says were those——

Mr. Messner: Just a moment, not what he was told was the X-rays showed.

The Court: Objection sustained.

A. (Continuing) About two months after the accident he returned to work. Dr. Gates told him about this time that he had an arthritic condition.

Mr. Messner: Pardon me. Just a moment.

Mr. Nichols: Q. Doctor, you won't be permitted to tell what the doctor told him. Actually the X-rays taken were negative, is that not correct?

A. Yes, sir. [39]

Q. Meaning there were no fractures?

A. No fractures.

Q. In any part of the history if by chance it appears where he is relating something that somebody else told him, we will eliminate that portion of it, Doctor. A. Yes.

Q. All right.

(Testimony of Lloyd Delbert Fisher.)

A. He said that the heat treatments helped him for two or three hours after each treatment, so he bought a heat lamp and heating pad for himself and used these at home about three times a week to his shoulders and back.

He did not see Dr. Gates for about six months. Shoulders and back were bothering him more than he thought they should, so he returned to Dr. Gates and was given a few more treatments. This did not seem to help except for a brief period of time, so he didn't return.

On the 22nd of September of 1953, I believe it was, he threw a switch at work, and as he threw it felt like something hit him in the back, like a sledge hammer, he describes it, and when he straightened up he got a pain in the back underneath his ribs.

He went and saw Dr.—went to see Dr. Stepman, the company doctor at San Leandro, who gave him some pain pills and some pills for muscle spasm. That evening he took a warm bath. That seemed to help, but got a fever and headache. The [40] following day he returned to the S. P. Hospital where further X-rays were made.

He returned to the S. P. Hospital for heat and massage to the back and shoulders daily for four days, and then received a release to return to work on light duty, but the company would not accept the light duty release, so he returned to the hospital, saw Dr. Schuster, who taped his back. Then he returned to work for two days, but began hurting

(Testimony of Lloyd Delbert Fisher.)

again so again returned to the S. P. Hospital, this time saw Dr. Rubin.

Dr. Rubin removed the tape from his back, advising him to work for about three weeks, telling him that——

Q. That is hearsay unless counsel wants it in.

A. Dr. Rubin gave him a release to return to work the following Tuesday, but since his back was still quite painful, did not return to work.

Was next seen by Dr. Strange at S. P. Hospital October 14. Dr. Strange—well, they wanted him to enter the hospital, but he didn't feel that this would benefit him, so did not go in.

He denied any trouble with the neck or back prior to the accident of September 1952, and when I saw him he hadn't worked since October the 7th of 1953, due to the pain in his back and shoulders principally.

Q. Now, did you make any finding as to what his present symptoms were?

A. Yes, I did. You mean examination? [41]

Q. Yes.

A. I did a general physical examination to see whether there was anything in his general health which might affect the parts of which he complained, or of his ability to recover from them.

Q. What complaints did he make to you at the time he saw you, Doctor?

A. Well, he complained of a soreness in the shoulders all the time, which came more severe if he moved around and if he did any lifting. He also

(Testimony of Lloyd Delbert Fisher.)

complained of pain in the lower back if he lifted, turned, bend over, or if he would sit in any one position for any period of time. Also pain in the back of the neck after he worked a while. Believed this was caused by the other pains and the muscles of the neck would tighten up.

Sometimes he would have ringing his ears. Lately, quite a few times after he had over-exerted, he would become nauseated. This seemed to come at the same time as the headache and neck pain. After he over-exerts or works hard he had the experience of starting to raise his head and everything became blurred. He believed that he was more nervous and irritable.

When he—after—since his injury and until he went off work he was taking it easy.

Q. Was there anything in his past history that was contributory to his complaints, or could you tell us that? [42]

A. No, the only thing that, positive, was the virus infection in 1950 for which he was confined to the Southern Pacific Hospital for nine days, but had complete recovery. Also had appendix removed, S. P. Hospital, 1948, complete recovery. Those were the only positive things.

Q. Now, did you make an examination of him?

A. Yes, I did, and I examined him both with relation to the specific complaints and also to the general physical examination of his eyes, ears, nose, threat and heart, chest, abdomen.

(Testimony of Lloyd Delbert Fisher.)

Q. Those things you found to be in what condition?

A. Well, they were all in normal limits. General health was otherwise good.

Q. Pardon me?

A. I say his general health was otherwise good.

Q. All right. Now, what physical examination did you give him—I mean, what orthopedic examination?

A. Well, in examining his neck I found there was marked left sub-occipital tenderness and also tenderness in the mid posterior cervical region.

Q. Doctor, that means something to a medical man, but to a lay person it doesn't usually indicate what you are talking about. Can you tell us in more language what that means?

A. Well, the sub-occipital region is the region just below the skull in the back, and in his case on the left side, and then the mid posterior cervical region would be in the mid line [43] of the back of the neck, approximately half way between the neck and shoulders.

There was also tenderness in the left scalenus, and in both trapezius muscles, more on the right than on the left.

Now, the scalenus are muscles which come down in the side of the neck and attach to the first and second ribs, and the trapezius muscle is the muscle that comes from the neck down on the shoulder—you can pick them up with your finger here (in-

(Testimony of Lloyd Delbert Fisher.)

dicating)—and that one was tender on both sides, more on the right.

I examined the motion of his neck. There was full motion in all directions, but all extremes of neck motion caused pain, especially in the upper and mid back.

There was tenderness in both trapezius muscles and both the parascapular regions. Parascapular region, that is the region between the shoulder blade and the spine in the back, and both of those were tender. There was full motion of both shoulders, but extreme motions gave pain in the mid back.

In examining his low back there was marked bilateral lumbar tenderness, that is in the back below the ribs between the ribs and the pelvis. On both sides he was markedly tender, more on the left than on the right. The tenderness on the left extended laterally, that is to the side, to the mid axillary line. In other words, came around from the back to a point about here (indicating). [44]

I examined the motion of his back. On bending forward the fingertips came to within four inches of the floor. Backward bending was complete. Side bending to the right and the left were normal, fingertips reaching the level of the lower pole of the kneecap. Rotation of the spine to the right and to the left was 90 degrees, which is within normal limits.

All extremes of motion of the back, especially rotation, that is, bending the body, shoulders

(Testimony of Lloyd Delbert Fisher.)

around, gave pain in the mid back. That was all the orthopedic examination.

Q. Following the physical examination did you have any X-rays taken?

A. Yes, sir, I did.

Q. And of what areas?

A. Had X-rays made of the neck, the cervical spine, the thoracic and lumbar spine. The thoracic is the upper spine between the neck and the bottom of the rib cage, and the lumbar spine being between the ribs and the pelvis.

Q. That would mean, then, in sections you took his entire spine?

A. Yes, that's correct.

Q. All right. And they were negative for fracture; that is correct, is it not? A. Yes.

Q. Was there any significant finding that you made from the X-rays that would be helpful in arriving at a determination [45] of what happened to this man?

A. Well, there was a mild curve, lateral curve, what we call a scoliosis, in the upper back, the thoracic spine, with apex of the curve at the level of the seventh thoracic vertebra on the right. Whether that had been there previous I had no way of knowing. It might be the result of muscle spasm.

In the X-rays of the neck, the cervical spine, there was a list of the spine to the right. In other words, it leaned to the right.

There was also an assymmetry of the position of the deltoid process in relation to the lateral

(Testimony of Lloyd Delbert Fisher.)

masses of the atlas being closer to the later mass on the right than to the lateral mass on the left.

Now, this was associated with a shifting of the entire first cervical vertebra to the left side in relation to the second cervical vertebra, some narrowing of the joint space on the left as compared to the right.

These findings in the presence of injury are an indication of muscle spasm.

Q. Now, when you saw him, Doctor, as he went through these tests, could you tell us whether or not he was cooperative with you?

A. Yes, he was very cooperative.

Q. And did you come to any conclusions as to what had happened to this man? [46]

A. Yes, I felt that he had an acute neck strain, a bilateral parascapular strain, that is, the upper back between the shoulder blades, and a low back strain, and these all associated with bruising of the back—contusion, that is.

Q. Well, you used the term strain. Doctor, in your opinion was there any actual changes that occurred within the neck or lower back or the areas involved?

A. Yes, a strain, of course, is what occurs when you pull a soft tissue like a ligament or a muscle. You pull it beyond its elasticity, its power to return to its normal length, and when you do that some of the fibers will actually tear. It isn't like tearing a ligament or muscle completely across, you call that complete rupture, but it is, like, you say you had

(Testimony of Lloyd Delbert Fisher.)

a hemp rope that had been overpulled and some of the little fibers of the hemp would break—I think some of you may have seen a rope like that—and which would, of course, not be obvious at a distance, but see it at close quarters.

That is what happens. These are like little fiber-like tissue and they have a blood supply, and if they are torn, there is bleeding, and of course Nature repairs those, as she organizes the clot, and eventually change into scar tissue, each little place that was broken; end up with a little bit of scar and the result is multiple scars in this tissue that is strained.

Q. Did you find him to be a large and well muscular man, with [47] good muscle?

A. Yes, he is a big man and he is very well developed physically.

Q. As compared, say, with a broken bone, does scar tissue form in the muscles or in the tissue as rapidly, say, as, oh, callous will form in a broken bone?

A. Well, it forms more rapidly than callous.

Q. Well now, you saw him, Doctor, it was a matter of—say he was injured in '52, in September '52, you saw him in October of '53, medically do you have any explanation why he should be making complaints at that time?

A. Well, there are several reasons. In the first place, I think that his strains were rather severe, I mean, severe enough that he had enough residual scarring in there to give him trouble. Of course, all

(Testimony of Lloyd Delbert Fisher.)

scarring doesn't give trouble, but when it does give trouble it is because it is in a position where it is constantly pulled on. You see, when a scar matures, as it gets older it contracts, and so that the part tends to be tight. That's why, in our treatment, we try to stretch them out and soften them up by massage and so forth, and if it remains tight in spite of treatment, then every time that is pulled on it stretches the adjoining tissue and makes it painful.

Another thing that happens, sometimes these little nerve endings, these little pain endings are tied up in the scar and [48] then each time the scar is pulled on it irritates that pain ending.

Q. Did you get a history from him on returning to work things that didn't require lifting or bending he could do pretty well?

A. Yes, with a light type of work that didn't require a lot of stooping, bending and squatting or climbing, he wasn't bothered too much.

Q. Assuming the complaints he tells you that he has, the aches, and assuming the history that he had, would that be a type of thing that would be a cause of pain, as, say, trying to throw a switch that requires some weight or some muscle?

A. Yes, the force of the exertion is important, and also the number of times, repetition.

Q. Now, did you make any recommendation to him so far as continuing treatment or anything of that kind?

A. Yes, I did. I thought that he should continue

(Testimony of Lloyd Delbert Fisher.)

treatment and also made some further suggestions that he hadn't up to that time received. He had the heat and massage, and of course ideally I think more rest, less fatigue, would have been beneficial, but he felt he had to work, of course, and also suggested injecting the points of maximum tenderness with some local anesthetic like novocain, the use of a back support also.

Q. Now did you see him subsequent to that, Doctor? A. Yes, I did. [49]

Q. Will you give the Court and ladies and gentlemen the next date?

A. Next saw him on August 10 of 1954, this year, and I saw him on the 28th——

Q. What if anything transpired on August 10, an examination made or——

A. Yes, I asked him what had transpired since I had seen him previously and also what his complaints were at the time.

Q. What history did you get in that regard?

A. He said that he had been hospitalized twice since October of 1953; once in November '53 and again in mid-December. In November for 10 days. He had novocain injections in his neck and he was also put in traction, that is, a pull in his neck while he was in bed, and received diathermy and massage with temporary relief.

In December he was hospitalized for three weeks and at that time had a hernia operation, following which there was a good recovery and he returned to work on February 1, 1954.

(Testimony of Lloyd Delbert Fisher.)

After working three or four days he had to return to the outpatient department because of pain in the neck and back, but continued working, received more diathermy and massage.

In June of 1954 he had six X-ray treatments, one every other day, with questionable relief. He felt that he still had as much pain as before.

Three weeks before I saw him—that would be the latter [50] part of September—he had received novocain injections in the neck and obtained relief from these for a period of about five days to a week.

He was not working but had considerable pain.

In November he worked only two days and did not return to work until February the 1st. He worked steadily since that time at his regular job except for a few days off.

Q. What symptoms were present when you saw him in August, Doctor, of this year?

A. He complained of pain in the shoulder which is aggravated by over use such as in bending and reaching and so forth. He also complained of pain in the neck. When this pain is present, which is almost constantly, headaches begin and occur weekly, sometimes lasting two or three days. The neck becomes tense and taut and when this occurs he becomes nervous and irritable.

He complained of pain in the mid back and this pain seemed to radiate upward into the head and shoulder. When you hold the outer tips of the

(Testimony of Lloyd Delbert Fisher.)

fingers, both hands back, numbness prevailed until rest or relaxed, and took medication.

Q. Now, did you again make a physical examination of him?

A. Yes, I examined him again and the neck, that was still marked by lateral sub-occipital tenderness below the skull. This time on both sides, full motion of the neck and in all directions, but pain on extreme motion. I checked sensation [51] in the back and neck with the point of a pin, and in the right lower posterior neck there was some diminished sensation here as compared to the other side. In the upper back there was marked tenderness in both trapezius muscles, muscles that run from the neck to the shoulder, and on full shoulder motion there was pain between the shoulders, pain on extreme shoulder motion.

In his super extremities, because of complaint of pain going down into his fingers, I examined the sensation with the point of a pin but found no change in the sensation in that test between the two arms. I also measured the circumference of the arm above and below the elbow to see if any atrophy, comparatively, and the right arm is larger than the left both above and below the elbow, which was consistent with the fact that he was right handed.

Q. That would be normal?

A. Yes. And I also tested his grip with a little device we call the dynamometer, a bulb with air pressure and registers on a gauge, and his—al-

(Testimony of Lloyd Delbert Fisher.)

though the grip seemed weak for a man of his size and occupation, the comparison between the two sides was about normal. The right was stronger than the left, tried each one three times alternately right and left, and the right range 119½ and 10½ pounds, whereas the left range ran 89 and 10 pounds. There was full motion of all the joints of his fingers, hands, wrists, elbows, and shoulders. His [52] low back, there was tenderness in the lumbo sacral region on which is the whole lower part of the back, the small of the back where the spine joins the pelvis and in the right sacroiliac region on that just to the right of the lumbo-sacral joint. I tested his back motion again, and on bending forward his fingertips reached to 4½ inches to the floor which is—which is within normal limits. Backward bending was complete but this gave the most pain. Bending to the side was normal and rotation was normal.

Straight leg raising, which is a test made with the patient lying down and raising the leg straight up, he had 95 degrees in the right and 100 degrees in the left, but the right gave him pain in his low back. Leg lengths were equal. The circumference of the legs above and below the kneecap showed the right thigh to be slightly smaller than the left above the kneecap on the right. On the left, 20⅞ inches, or five inches below the kneecap both the same, 15 inches.

Also tested sensation in legs which were normal, reflexes were normal.

(Testimony of Lloyd Delbert Fisher.)

Q. Now, Doctor, from your examination and from the history, in your opinion is there any connection in the complaints that he complained to you about here, on August 10th, that you would relate it to the accident that he had in September of '52?

A. Yes, I believe that they resulted from that accident and [53] also this re-injury of his upper back in November of '53, I believe it was.

Q. Is that injury to his upper back of '52 connected with the original injury, in your opinion?

A. Well, I think he was probably vulnerable because of his previous injury, and that in attempting to do what would otherwise be normal work, he got increased pain.

Q. During the noon hour did you have occasion to review some of the Southern Pacific Hospital records? A. Yes, I did.

Q. And I noticed, Doctor, here, that on February 19 of 1954 the doctor there makes a notation there of marked muscle spasms of the musculature of the lumbar spine. Is that something that you would attribute to this accident?

A. Yes, very much so.

Q. Now, is that—excuse me, counsel—that date is February 19, 1954. Says: "Plaintiff returned with similar complaints, physical therapy offered, only temporary relief as due hot baths at home, marked muscle spasm in musculature of the right lumbar spine, back examination otherwise negative." And then makes suggestion of physical therapy. Have

(Testimony of Lloyd Delbert Fisher.)

you reviewed the records and found other notations where there was a finding here of, as late as 1954, muscle spasm?

A. Yes, there were three places in 1954, I believe, when muscle spasm was mentioned. Once in the—One was in the low [54] back, one would be between the shoulder blade, upper back; and the other in the neck.

Q. What does that mean to you, Doctor, a man with your training? What does the presence of muscle spasm mean?

A. Muscle spasm is the response of the body to pain. It is an attempt to arrest the part, limit the motion. It's an entirely involuntary thing, it is something that an individual has no control over himself, voluntarily. It's an increase in the contraction of the muscle. A normal muscle that is alive has a certain amount of contraction, normally what we call muscle tone. When the amount of that is increased, pull is increased through involuntary reflex. We call that a spasm.

Q. Is that something that, say, that Mr. Blazin could go out and make himself, a spasm in that area, voluntarily?

A. No. No, he can't do it. It is entirely involuntary, out of voluntary control.

Q. Is that something a medical man can see or feel?

A. Yes. The superficial muscles, you can feel it, if present to any degree. Of course, in deep muscles you can't put your fingers on those.

(Testimony of Lloyd Delbert Fisher.)

Q. Now, following your seeing him in August, did you see him subsequent to that?

A. Yes, I saw him in October 28 of this year.

Q. Was there any substantial change in his condition?

A. No, it was just about the same as before.

Q. And have you seen him any time since then?

A. Yes, I saw him on November 16 and November 18.

Q. And what is your actual opinion, Doctor, as to the man's condition—withdraw that.

The effect of this accident, what has it done to him, anything that will remain with him?

A. Yes, I think it has given him trouble, some of which at least will be permanent. It's been over two years since he was hurt now, and he still has a great deal of discomfort trying to work and he has had almost every type of treatment that we know for the condition except surgery, and of course you don't encourage surgery to the back. It requires a long period of convalescence in addition to being expensive, and if a man can do any other type of work we would rather not fuse his back.

Q. Doctor, in the times you have seen him has he ever indicated to you anything that would cause you to believe that there was any exaggeration of his complaints?

A. No, there hasn't been anything.

Q. Having in mind his history, and the present complaints that he has, and the hospital record that shows here, early as March, the existence of muscle

(Testimony of Lloyd Delbert Fisher.)

spasm, would that be of any help in permitting you to arrive at a conclusion as to how extensive the original injury was?

A. Yes, I think that he must have had a rather marked strain, [56] bruising, quite early at the time of the injury. And in spite of the treatment, possibly because he has tried to work all this time, it has ceased to improve beyond a certain point.

Q. Would you expect to get, or how much more improvement would you expect to get in the future, assuming he has good medical care?

A. Well, I think the thing to do, the type of work that he is doing, I think he is going to have quite a bit of pain. There are one or two things which haven't been tried which might improve him some, I think. But, to expect them to cure him would be expecting far too much. He might have some further improvement, probably.

Q. Would you anticipate that if he goes along with this type of work that he would suffer pain in the future?

A. I think, yes, he will always have pain.

Q. Will you tell us what your total charge has been to him for the services you have rendered?

Mr. Messner: Pardon me a moment. Insofar as charges the doctor may have had in connection with the examination, that may have gone for the information of the plaintiff or his attorneys. I don't think that they are proper.

Mr. Nichols: He never made any examination for me for information.

(Testimony of Lloyd Delbert Fisher.)

Mr. Messner: Well, Mr. Nichols, I think that the plaintiff testified he was not treated by this doctor until six [57] weeks ago and I have no objection to——

The Court: Q. What would you consider a reasonable charge for treatment, for the treatment you gave him, Doctor?

The Witness: Twenty seven fifty, I believe.

The Court: As far as the Court is concerned, if Mr. Blazin went to the doctor of his own volition wanting to get some assistance or some knowledge as to his condition, I think it is a perfectly proper charge and I will receive it in evidence.

Mr. Nichols: Q. What was the total charge made, Doctor?

A. I say, I didn't bring the card, but I can figure it here.

Q. Well, I wouldn't press it now. We can pass over that.

Do you anticipate, Doctor, that he will require any further immediate care?

A. Well, I think he will, symptomatic care, supervision, I mean, periodically, depending on what he is doing and how much pain he has at the time.

Mr. Nichols: That is all. Thank you.

The Court: Q. By the way, Doctor, when you made this examination of him, you didn't make it solely for the purpose of coming here to testify?

The Witness: No.

The Court: Q. You made that examination be-

(Testimony of Lloyd Delbert Fisher.)

cause you wanted to find out what was wrong with him, is that right?

The Witness: That is right. [58]

Cross Examination

Mr. Messner: Q. Doctor, do you have any file other than the report of October 29, 1953, and August 13, 1954? A. Yes, I have made——

Q. May I see that, please?

May I approach the witness, Your Honor?

The Court: You may.

Mr. Messner: Q. Now, Doctor, according to your report of October 29, 1953, and according to your testimony here today, at the time you examined Mr. Blazin you recommended that he wear a back brace, is that correct, sir? A. Yes.

Q. And that is when you first saw him in 1953?

A. Yes, sir.

Q. Now, when Mr. Blazin came back and was reexamined by you, and the next occasion was on August 10th of 1954, did he upon that occasion tell you that he had been wearing the brace that you suggested and recommended?

A. No, I don't believe he had.

Q. He didn't give you a history as to whether or not he had been wearing that brace?

A. No, I am pretty sure he didn't have a brace.

Q. You don't think he had been wearing the brace? A. No, he didn't have one.

Q. I see. All right. Now, do you know whether or not other [59] treatment that you recommended

(Testimony of Lloyd Delbert Fisher.)

in that report had been carried out in the meantime?

A. Yes, he had this radio injection. I don't know whether it was radio, at least novocain injections. He had that on a number of occasions at the Southern Pacific Hospital.

Q. I see. Now, Doctor, I note that in this first report that you made, you made a very detailed examination. And I note that among other things you have a notation appearing on page 3. I don't believe you have a copy of that.

(Witness is handed document.)

Q. Genital area, no hernia. Is that correct, Doctor? A. Yes, that is the notation I have.

Q. You examined this man, and particularly directing your attention to that in October of 1953. And at that time you found no hernia, is that correct, Doctor? A. Yes, that is right.

Q. Now, in the several examinations that you have made, Doctor, you have had X-rays taken, is that correct, sir? A. Yes, on two occasions.

Q. And on each occasion those X-rays had been negative for any indication of fracture, is that right? A. That is right.

Q. Now, you have made neurological examinations on this patient, have you not, Doctor?

A. Yes, sir. [60]

Q. Now, aside from, I believe you said, some hypothesia, on one side of the neck, on your examination on August 10, 1953 those neurological ex-

(Testimony of Lloyd Delbert Fisher.)

aminations have been negative, have they not, Doctor? A. Yes.

Q. Neurological examination, so that the jury and I understand that, that is something where you go over and test the various nerve courses over a man's body, so that if there has been any interruption in nerve course, is that right, broadly speaking, in layman's language?

A. Yes. In other words, in the—yes, that is right, yes.

Q. I see. Now, you made measurements in connection with this man's various extremities, did you not, Doctor? A. Yes.

Q. Now, when you made those measurements you found them to be within the normal limits?

A. All except the right thigh. On the last occasion the right thigh was smaller than the left.

Q. Right thigh smaller than the left thigh?

A. Yes, that is right.

Q. Now, you made various tests in connection with this man's ability to move the various parts of his body, did you not? A. Yes, sir.

Q. On every occasion you found that those motions were within normal limits, were they not?

A. Well, the range was normal.

Q. Range of motion was within normal limits. Now, you made certain tests of reflexes, of the reflexes of this man, did you not, Doctor?

A. That is right.

Q. And you found those all to be normal, didn't you, Doctor? A. That is right.

(Testimony of Lloyd Delbert Fisher.)

Q. Now, Doctor, all of these examinations we talk about are used by you medical men to arrive at conclusions as to whether or not people have things wrong with them or not, aren't they?

A. Yes, that is right.

Q. And they are quite important tests in making diagnoses as to what is wrong with the patient, isn't that true? A. That is true.

Q. And that is quite an important test to determine whether or not there is anything wrong or not with the patient, isn't that true?

A. That is right.

Q. Now, Doctor, you have appeared on many occasions and testified in cases which the Southern Pacific Company was involved on the other side, have you not? A. Number of cases, yes.

Q. As a matter of fact, I have seen you in court on many of those occasions, isn't that right, Doctor?

A. Well—— [62]

Q. We have seen one another?

A. Well, I don't remember many occasions, but——

Q. Well, Doctor, let me ask you just one more question. Do you ever recall a case that you came in and testified and the Southern Pacific Company was on the other side, where you said the man would get well?

Mr. Nichols: Object, Your Honor, as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Messner: No more questions.

(Testimony of Lloyd Delbert Fisher.)

Redirect Examination

Mr. Nichols: Q. Doctor, when you made the examinations here, in your neurological examinations, that is, to determine whether a man has any beginning of paralysis, isn't that true?

A. Yes, that type of thing.

Q. In other words, to make a complete examination you do that in order to rule out the possibility of contributing causes for disability, is that not correct? A. That is correct.

Q. Is most of the work that you get referred by the doctors? A. Yes.

Mr. Nichols: I think that is all.

Mr. Messner: No more questions.

The Court: Call your next witness. [63]

Mr. Nichols: Do you want those X-rays, Mr. Messner?

Mr. Messner: No.

Mr. Nichols: You may take them with you, Doctor.

JOHN BLAZIN

the plaintiff herein, recalled as a witness in his own behalf, having been previously duly sworn, testified further as follows:

Mr. Messner: May I proceed?

The Court: You may.

Cross Examination—(Continued)

Mr. Messner: Q. Mr. Blazin, I would like to find out a little bit more about this accident, just why or where it happened and how it happened, and

(Testimony of John Blazin.)

so forth. Now, as I understood your testimony on direct examination, the various cars had been in on Track No. 34, is that correct, sir?

A. That is right.

Q. Your locomotive went in on this track and coupled onto eight cars that had been standing there, is that true, sir? A. That is right.

Q. And I believe, you said you were following the engine, is that right, sir?

A. That is right.

Q. Now, so the jury will understand that, that means that you are the man that was working with the engine and closest [64] to the engine and making the couplings of cars to the engine, is that true, sir? A. That is true.

Q. So that when the locomotive came in against these eight cars you were the man who made the coupling here? A. That is right.

Mr. Nichols: Keep your voice up loud, Mr. Blazin.

Mr. Messner: Q. Now you had on that crew an engine foreman, I believe you said he was down here? A. That is right.

Q. You also had another man on that crew, a Mr. Moulton, did you not? Where was Mr. Moultin?

A. At the time I coupled onto the cars Mr. Moultin walked back to make a cut behind this car.

Q. Mr. Moultin had been up here?

A. He walked back there to make the cut.

Q. I see. Now, after that, at the time of the accident, do you know where Mr. Moultin went?

(Testimony of John Blazin.)

A. He walked down the lead to line the switches.

Q. He walked down this direction?

A. No, he came out and walked——

Q. He came back over here?

A. That is right, and then walked down the lead.

Q. I see. Well, when the locomotive came off—Strike that. When the locomotive went into Track No. 34 who lined the [65] switch?

A. Either I or the foreman, I am not sure.

Q. One of the two of you lined the switch. Then, so that the jury and I will understand this now, you pulled eight cars out on this lead track, is that right? A. That is right.

Q. Now, the engine would be coupled to this end of cars and there would be eight cars along in here, between this switch and the locomotive would be eight cars, is that correct, sir? A. M-hm.

Q. All right now, after the cars got out of this track you were going to move down this direction, and in order to move that direction someone has to throw the switch to the 34 track?

A. That is right.

Q. Who threw that switch?

A. The foreman.

Q. The foreman threw that switch? Now, when the cars came out you were standing alongside of the lead track, the engine and number of cars must have passed by you. Do you know what car you were opposite when the cars came to a stop?

A. I was within about ten feet of the rear car.

(Testimony of John Blazin.)

Q. Ten feet of which end of the rear car?

A. That would be the east end. [66]

Q. The rear end of the rear car then?

A. No, that would be the end where they were connected together.

Q. That would be this end back this way?

A. That is right.

Q. In other words, the car is coupled here and you were ten feet from this end of the car, is that right? A. Approximately.

Q. All right. Now, when the cars got clear of this switch someone gave a signal to the engineer to stop. Who gave that signal?

A. The foreman I suppose.

Q. The foreman gave the signal? Are you sure about that?

A. Well, he would—it would be his duty to.

Q. Might not it also be your duty to give the signal?

A. At the particular point where I was at I was out of the view of the engineer, there is a double curve there.

Q. The engineer could not see you at this point then? A. No.

Q. All right. After these cars had been pulled back here and the foreman gave a signal to cut one, now, you have in railroad parlance what you call a "kick", you shove a car and cut it loose and let it roll free? Isn't that what a kick is?

A. Yes, sir. [67]

(Testimony of John Blazin.)

Q. Now, did you intend to kick the car on down to some other track down here?

A. That was the intention.

Q. You intended to kick it down here, you didn't intend to push it clear of this switch and then shove the one in——

Mr. Nichols: Well, that would be the engineer that would determine that, wouldn't it?

Mr. Messner: No, sir, it would not.

Mr. Messner: Q. So, you intended to kick that car on down through there. All right, now, Mr. Blazin, have you worked in that portion of the West Oakland Yard for any great period of time in your experience as a yardman?

A. On different occasions I have.

Q. You have worked there considerable periods of time. Have you ever been permanently assigned to a job in that area?

A. I have. I have been.

Q. For how long a period of time?

A. Oh, a month, six weeks. Sometimes two months.

Q. Well, if you have been assigned permanently in that area then I assume that you are aware that Track No. 34 is a track that you sometimes find with a derail up on the rail, don't you?

A. I have never seen a derail in there.

Q. You have never seen one on Track 34?

A. There is no derail. [68]

Q. Did you ever see them repairing cars on Track 34? A. No, sir.

(Testimony of John Blazin.)

Q. Ever see the pullman company in there repairing cars?

A. I seen electricians going into the cars. I don't know exactly what they were doing.

Q. You saw men working around the cars?

A. Well, the Pullman Company changing towels and linen.

Q. I see. Now, down in—I think this track is just a little bit different here. I am not quibbling with your drawing, Mr. Nichols, but I think that it comes off more like this and then there is some other tracks coming out this way. And that right down in here there is a track known as Track No. 20, is that right?

A. No, track 20 is up on the 28 lead.

Q. Oh, then it comes off this way, is that right?

A. That is right.

Q. Well, is that where you are going to take the car Charlotteville, up on Track No. 20 on this occasion?

A. I didn't know. I knew we were going to kick it up 28 lead.

Q. You are sure you didn't know?

A. That is right.

Q. Now, what is Track No. 20 generally used for, Mr. Blazin?

A. It's a storage track so far as I know, all of those tracks are. [69]

Q. Isn't it a fact that the Southern Pacific Company does their repair work on 20, 22, and down in this area of the yard?

(Testimony of John Blazin.)

A. Well, the Pullman Company does their linen work. I don't know just——

Q. But that is up in here, 34, 36, and 32, is it not, Mr. Blazin?

A. It is throughout the whole yard, sir.

Q. In other words, I believe you testified on direct examination that the only Pullman cars you have in here are those that are out of service, isn't that right, sir?

A. Well, some cars are only out of service for only an hour or two, until they——

Q. Well, that may be true, sir. But, while they are out of service that is where they would be, is that right? A. That is right.

Q. And some of them may be in there for a month out of service, is that right, sir?

A. That is right, sir.

Q. Now, I would like to show you if I may—. Do you have any objection to this?

Mr. Nichols: None at all.

Mr. Messner: May I approach the witness, Your Honor?

The Court: You may.

Mr. Messner: Q. I show you this form 2611 and ask you to look it over for a moment. [70]

(Handing document to witness.)

Mr. Messner: Q. Now, this form 2611, Mr. Blazin, is that a report that you made of this accident? A. Yes, sir.

Q. Is it made in your own handwriting?

A. Yes, sir.

(Testimony of John Blazin.)

Q. Is it signed by you? A. Yes, sir.

Q. And was it made on the same day that the accident occurred? A. Yes, sir.

Q. And this report, in this report, didn't you indicate that you were making this move from Track No. 34 to Track No. 20?

A. That was—I made the report out after the injury and that is when I knew exactly what our move was, and stated our move as it was going to be.

Q. That is fine. I don't want you——

Mr. Nichols: Counsel, I have no objection to putting the report in evidence.

Mr. Messner: All right. May this be introduced into evidence?

The Court: It may be entered.

(Whereupon the above referred to document was received in evidence as Defendant's Exhibit A.) [71]

Mr. Messner: Q. Now, that you were making a move into track 20, were you not?

A. Yes, sir.

Q. And Track No. 20 is a repair and maintenance track, is it not, sir?

A. It is a storage track so far as I know, sir.

Q. Well, isn't it a fact that you were actually washing some passenger trains on this day?

A. We pull them through the wash rack with the engine.

Q. Yes. Isn't that what you had been doing?

A. Well, that was in our normal tour of duty to

(Testimony of John Blazin.)

pull trains through the wash track and switch them.

Mr. Messner: Would you like to take the afternoon recess?

The Court: We will take the afternoon recess. Again I admonish you not to talk about the case, form or express any opinion about it until it is finally submitted to you.

(Short recess.)

The Court: Proceed.

Mr. Messner: Will you resume the stand, Mr. Blazin?

Mr. Messner: Q. Now, just to go back for a moment, Mr. Blazin, my understanding is that as far as you are concerned then, it is your testimony that these tracks in this area, 34, 36, 32 are storage tracks? A. That's right.

Q. Track No. 20 down here is also a storage track? [72] A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now, when you say storage track you mean it is a track, that is the name of a nominal thing that you refer to as a storage track is that right?

A. That's right.

Q. Do you know what those tracks are used for?

A. To store the cars.

Q. Do you know what is done with the cars while they are stored, or doesn't your experience go that far?

A. They are cleaned to be ready to go on their next trip.

(Testimony of John Blazin.)

Q. They are maintained and cleaned and repaired, is that right?

A. Well, I don't know just what the repair men do, I know they are cleaned.

Q. You know they are worked on?

A. That's right.

Q. All right, sir. In connection with the accident itself, my understanding is that you took ahold of the grabiron with your left hand and stepped up onto the steps of the pullman car as it was still standing still, is that correct, sir?

A. Yes, sir.

Q. And at about that time the train started to move, is that [73] right? A. Yes, sir.

Q. And when the train started to move you reached with your right hand for a grabiron and you didn't find a grabiron was there, is that right?

A. That's right.

Q. When that occurred you swung around, your back was struck by the corner of the car behind you? A. That's right.

Q. Now, do you know what kind of a car it was that struck you? Was it one like the Charlottesville, another pullman car?

A. It was another pullman car.

Q. Was it another green pullman car?

A. Yes, sir, I believe it was.

Mr. Nichols: Mr. Blazin, I don't hear you well.

The Witness: I say: Yes, sir, I believe it was.

Mr. Nichols: Thank you.

The Witness: (Continuing) Another green one.

(Testimony of John Blazin.)

Mr. Messner: Q. I have two photographs here —do you have any objection?

Mr. Nichols: No. I want to explain that is after they put the grabiron back on.

Mr. Messner: Yes, we are not maintaining this was a picture of the car as it was on the day of the accident, just for the purpose of illustration.

Mr. Messner: Q. Now, as I understand your testimony on direct examination, your feet had both slipped off the step and both feet were on the ground and you then swung around backwards and struck the car, is that true, sir?

A. That's right.

Q. You said that you were knocked down; were you knocked down flat on the ground?

A. Yes, I was knocked down on the ground when I got hit in the back.

Q. Did you fall on your face, on your back, or how did you fall? A. On my hands.

Q. On your hands and knees?

A. Yes, sir.

Q. Were you knocked unconscious?

A. No, sir.

Q. Did anyone see you while you were on the ground?

Mr. Nichols: That calls for a conclusion. We object to it on that ground.

The Court: Objection sustained.

Mr. Messner: Q. Where was the foreman when this accident occurred?

A. Approximately by 34 switch.

(Testimony of John Blazin.)

Q. I think you said that is about one hundred feet away? A. Yes, sir. [75]

Q. Now, after you were knocked down on the ground, Mr. Blazin, did the cars keep going or did they stop?

A. The foreman stopped the cars; either he or I.

Q. Either what?

A. Either he or I, as I went down,—I don't know what happened, but the cars had stopped.

Q. How quickly did they stop?

A. Well, it was within seconds.

Q. You say either he stopped them or you stopped them. Did you give a stop signal?

A. I don't remember when I got hit; I don't remember just what did happen.

Q. I see. Were you in a place where the engineer could have seen you knocked down?

A. Possibly, as I was knocked out in the way, he might have, I don't really know.

Q. It was daylight, was it not?

A. All right. I am going to show you a photograph of the car involved, marked Defendant's Exhibit C. Now, that is the car that you were working on at the time you were injured. I believe you testified this morning that the vestibule door was open on the car, is that correct, sir?

A. Yes.

Q. And the trap door was up, too, wasn't it, sir?

A. Yes, sir. [76]

Q. Now, so that the jury might understand what the vestibule door is and what the trap door is and

(Testimony of John Blazin.)

what the steps are, I would like to pass this picture to the jury if I may, your Honor.

Mr. Nichols: Is that door open there or closed?

Mr. Messner: It is closed in that photograph.

Mr. Nichols: Do you have one that is open?

Mr. Messner: I think not. (Passing exhibits to the jury.)

Mr. Messner: Q. Now, the corner of the car behind you, you say, struck you in the back, starting from back of your head on down. How far did it go, Mr. Blazin?

A. I imagine all the way down just as—well, below the waistline.

Q. Clear down below the waistline?

A. That's right.

Q. Did you have bruising of your spine all the way down, did it get black and blue?

A. Not to any—I couldn't see it.

Q. Now, Mr. Blazin, you laid off four days after this accident, or three days, something like that, went to see Dr. Gates?

Mr. Nichols: Worked three days and then laid off, isn't that it, counsel?

Mr. Messner: I beg your pardon, that is correct.

Mr. Nichols: He worked three days and then went to the doctor.

Mr. Messner: I got confused.

Mr. Messner: Q. You worked some two or three days and then you laid off and went to Dr. Gates. Now, isn't it a fact, Mr. Blazin, when you went to Dr. Gates and while you were off the latter part

(Testimony of John Blazin.)

of September and the first part of October you had Mumps?

A. Doctor Gates said I had a swelling of the glands; whether it was Mumps or not I don't know.

Q. At any rate, why, you had some swelling of the glands in this area, did you not?

A. Yes.

Q. You stayed home and were treated for that condition by Dr. Gates?

A. About a week I believe.

Q. How long were you confined to your home because of that condition?

A. I believe about a week, I was in bed.

Q. You were in bed about a week, and that was right after you laid off, was it not, sir?

A. Oh, approximately two weeks after I laid off, something like that.

Q. Now, I would like to—May I approach the witness, your Honor? [78]

I have this picture marked, Mr. Blazin, and this is still Defendant's Exhibit C. There is a lever coming down at the bottom of the car here and a v-shaped affair, and I am going to put a B-3. Now, what is that lever?

A. That is the cutting lever.

Q. That is the cutting lever, that is the lever you were going to lift up so the cars would come apart? A. That's right.

Q. All right, sir. Now, your feet were both on the bottom step, is that right, sir?

(Testimony of John Blazin.)

A. I believe I had them both up, I am not quite sure.

Q. All right. And to the left of the lead car is a grab iron, that is the one you had ahold of with your left hand, is that right? A. Yes.

Q. Mark that B-4. And to your right in this photograph is another grab iron. Mark that B-5. is that the one that you were reaching for but you didn't find there? A. That's right.

Q. I see. Then back here on the trailing car, see an edge of the car coming down, and understand I don't contend this is the same car, this is the portion of the car that hit your low back here, is that right, sir? A. That's right.

Q. And make an arrow to that, mark that B-6. Thank you, [79] Mr. Blazin. Now, there seems to have been some misunderstanding about a matter, Mr. Blazin. You recall when your deposition was taken, do you not?

A. When it was taken?

Q. When your deposition was taken?

A. Yes.

Q. And you recall on that occasion you were represented by your attorney? A. Yes, sir.

Q. Mr. Digardi was present, the deposition was in Mr. Nichols' office, was it?

A. I believe it was taken in Dunne-Dunne.

Q. Taken at Dunne, Dunne and Phelps. All right. But your attorney was present?

A. Yes, sir.

Q. You remember that on that occasion you were

(Testimony of John Blazin.)

sworn by a Notary to tell the truth, just as you have been sworn here today? A. Yes, sir.

Q. And you were asked questions by an attorney for the defendant? A. Yes, sir.

Q. At that time, and before the deposition started the attorney for the defendant Railroad had told you that if you didn't understand the questions to let him know and he would [80] try to clear them up, isn't that right, sir?

A. That's right.

Mr. Messner: This is page 42, line 13.

Mr. Messner: Q. Mr. Higgins, who is from our office, who took this deposition, asked you a question about Doctor Fisher and he says:

"Question: Who sent you to Dr. Lloyd Fisher?"

The Court: Mr. Messner, I prefer you show the deposition to the——

Mr. Messner: I beg your pardon, Your Honor.

The Court: ——witness and let him read it, then ask questions about it. I think it is a more satisfactory way of doing it.

Mr. Messner: Q. I show you the deposition then, starting on page 42, line 13, and ask you if that question was asked you and that answer given?

A. I gave that answer.

Q. Thank you.

A. Mr. Higgins asked you:

"Question: Who sent you to Dr. Lloyd Fisher?

"Answer: Mr. Nichols and Mr. Digardi."

Is that true?

A. Yes, sir. I called and made the appointment

(Testimony of John Blazin.)

and Mr. Digardi and—Mr. Nichols then gave me a list of doctors I might choose from. [81]

Q. I believe this morning you testified as to the amount of money that you had earned and been earning. I think you said you had been earning something like $430 a month gross, is that right, sir?

A. It differed every month, although on the average I should say that was about right. Some months——

Q. That would be, something around $5,000 a year? A. That's right.

(Counsel showing papers to other counsel.)

Mr. Nichols: No objection to these if you tell me they are taken from the company books on what he made.

Mr. Messner: They are.

Mr. Nichols: You have one for the year, whole year prior?

Mr. Messner: I think I have. Just a moment.

(Colloquy between counsel, inaudible to the reporter.)

Mr. Nichols: This is '52. That would show——

Mr. Messner: 4160 gross and 3690 net.

Mr. Nichols: All right, I have no objection to those.

Mr. Messner: May these be placed in evidence, then, Your Honor, marked Defendant's Exhibit next in order?

The Clerk: Defendant's Exhibits D, E, and F.

(Testimony of John Blazin.)

(Whereupon documents referred to above were admitted into evidence as Defendant's Exhibits D, E, and F.)

Mr. Messner: Q. Now, Mr. Blazin, you had an incident [82] in September of 1953 in which you injured your back, is that correct, sir?

A. My back went out, yes, sir.

Q. And at that time you were throwing a switch, is that right? A. That's right.

Q. Now, at the time that incident occurred, you made an accident report, did you not?

A. Yes, sir.

Q. Just the same as you had made when you were injured September 15, 1952?

A. Yes, sir.

Q. When you made that accident report, Mr. Blazin, did you on that report state that you had simply pulled a muscle because that had been previously injured, or did you say you injured your back?

A. I don't recall just what I did say. Probably mentioned that my back had been——

The Court: Keep your voice up, Mr. Blazin.

A. (Continuing) ——probably mentioned that my back had been out, I don't know just what I did state on the——

Q. At that time, you were throwing a cross-over switch from the Homestead to the 50 lead, is that right? A. That's right.

Mr. Nichols: Counsel, if you have a copy of the

(Testimony of John Blazin.)

report [83] I have no objection to it going in if you will let me see it first.

(Counsel showing documents.)

Mr. Nichols: I have no objection. You can use this copy instead of the original if you like, if it will be of help to you.

Mr. Messner: All right. May I approach the witness, Your Honor?

r Mr. Messner: I show you this 2611, which is a report of the incident that occurred September 22. Is that your signature, Mr. Blazin? A. Yes, sir.

Q. Is the balance of the form in your handwriting? A. Yes, sir.

Q. That is a report that you made of the incident? A. Yes.

Q. Could you show me on there where you indicate this was just a sprain caused by some back condition you had before?

Mr. Nichols: Just a moment. If the Court please I object to that, the report is the best evidence of what is on it.

The Court: Sustained.

Mr. Messner: Q. Mr. Blazin, you did not show on this report that there was a previous injury. Did you tell any of your fellow employes it was a previous condition that caused [84] your disability that started September 22, and I am talking about at the time this incident occurred?

A. I don't recall if I did or not.

Mr. Nichols: What is the date of that report?

The Court: September 22 of 1953, 3:25 p.m.

(Testimony of John Blazin.)

Mr. Messner: I have no further questions at this time of Mr. Blazin, Your Honor. I would like to offer this in evidence.

The Court: Let it be received in evidence and marked.

The Clerk: Defendant's Exhibit G in evidence.

(Whereupon Form 2611 referred to above was admitted into evidence as Defendant's Exhibit G.)

Redirect Examination

Mr. Nichols: Do you have the original report that was filed, Mr. Clerk? There was another filed on this accident that was offered in evidence.

Did you take an original report that was put in evidence? Maybe I did.

Mr. Messner: Which report is that?

Mr. Nichols: The report of this accident.

Mr. Messner: No, I didn't have the original report.

The Clerk: Defendant's Exhibit A.

Mr. Nichols: Your Honor, may I read this exhibit to save time instead of passing it to the jury?

The Court: I think you made the suggestion to Mr. Messner that you wanted to use the original, is that correct?

Mr. Nichols: Yes, Your Honor, that has been marked and received as Exhibit G.

The Court: Let it be received in evidence and you may read from it.

Mr. Nichols: (Reading)

"Division Western. Nearest Station West Oak-

(Testimony of John Blazin.)

land. State of California. Nearest mile post blank. Date of accident 9/22/53. Time of accident 2:25 P. Weather was clear, no rain or snow. Daylight. Kind of train, Yard. Train No. 1441. Engine No. 1441. Direction stop. Casualties to persons. Name and address. John B. Blazin. Age 27, Male, Married, Yardman, back injury. Name and address of witnesses; if employe, give occupation. Mullins, Engineer—Newman, Fireman—Geagan, Foreman—Jones, Yardman. What was done with or for injured persons. Saw Dr. Stepman. By whose direction, own. Name and address of attending doctor, 144 San Joaquin, San Leandro. What did injured person say as to cause of accident: throwing cross-over switch at Homestead from 50 Ld. Twisted or strained back. Who was present when statement was made? Blank. Could accident have been avoided, that is blank. If so, [86] how, blank. Did any jerk or rough handling or train cause or contribute to accident, no is written in there."

Then they have a number of things, "Main, siding or yard track," and it says "yard". "Straight or curved, right or left" and it says "straight." "Distance run after accident," none. If shoving or backing cars, who was on leading car, stopped" it says.

"Detail of cause and circumstances. Stepped off engine to" —I don't read this. May I ask the witness, Your Honor?

Q. What is this "stepped off engine to"——

A. Line.

(Testimony of John Blazin.)

Q. "Line switch to cross over from 50 lead Homestead to the pile or 70 lead. During the process of throwing switch got a pain in my back and was unable to straighten up."

That is signed John B. Blazin, 9/22/53. That is the date, Mr. Blazin, that incident occurred, is it not? A. Yes, sir.

Q. Now, you're required, if any condition of that kind arises to make a report and advise the company? A. Yes, sir, at all times.

Q. And did you thereafter go to the Southern Pacific doctor or advise him what had happened?

A. Yes, sir. [87]

Q. Now, you were asked about Dr. Fisher. Actually, you just tell the ladies and gentleman what —withdraw that.

At the time that you were seeing Dr. Fisher had you yet employed a lawyer? A. No, sir.

Q. And I am going to ask you when you made the request of me for the name of a doctor if I didn't give you the name of four doctors?

A. Yes, sir, four doctors, and I might use any that I wish, or any other doctor that I might get of my own accord.

Q. And I gave you the name of a doctor that did a lot of work for the Southern Pacific Company, didn't I? A. Yes, sir.

Q. Have you got the card with that on it now?

A. Yes, sir, I do, I think.

Q. That is the card we showed these gentlemen today, at noon, isn't it? A. Yes, sir.

(Testimony of John Blazin.)

Q. Let me have the card. And the names of the doctors I gave you was Dr. Dickson, Dr. Toffelmier, and Walker, Dr. Fisher and Dr. Bellamy?

A. That's right.

Q. And you made your own selection as far as a doctor was concerned, isn't that right?

A. I called Doctor Fisher and made my own appointment. [88]

Q. And even sent you to Dr. Bechtel, who is sometimes employed by the SP?

A. That is right.

Mr. Nichols: Have you any objection to this going into evidence?

Mr. Messner: No.

The Court: Let it be received and marked.

Mr. Nichols: There was one other report——

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Whereupon the card bearing names of doctors referred to above was admitted into evidence as Plaintiff's Exhibit No. 2.)

Mr. Nichols: That is all, Mr. Blazin.

The Court: Further questions, Mr. Messner?

Mr. Messner: Not at this time, Your Honor.

The Court: You may step down. Call your next witness.

Mr. Nichols: Mr. Moultin.

OLIVER A. MOULTIN

called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

The Clerk: Q. Please state your name and occupation for the record.

A. Oliver A. Moultin. [89]

Direct Examination

Mr. Nichols: Q. Mr. Moultin, will you tell His Honor and the ladies and gentlemen where you are employed?

A. Sir, I didn't hear the question.

Q. Will you tell us where you are employed?

A. Oh, I am employed by the Southern Pacific Company at Oakland.

Q. And were you employed on the train crew that was making, switching some cars out of Track 34 on September 15, 1952 when Mr. Blazin was injured? A. Yes, sir.

Q. And what was your particular task with that crew? A. I was the field man.

Q. And just what did your duties involve?

A. My duties as field man was to pull the pin on that car and send the car out and line up the switches for us to come on down the lead.

Q. Now, do you remember the day, it was a clear day? A. Sir?

Q. Do you remember the day was a clear day?

A. Yes, it was, I believe.

Q. And we have a rough sketch that we put on the board here that represents the old main line

(Testimony of Oliver A. Moultin.)

and this is supposed to be the track that goes off of the various leads, we placed the wash rack here, track 36, and then 34, 32 and 30, and then [90] 28 and down to 20. Is that generally the manner in which those tracks are arranged in the West Oakland Yard?

A. Yes, that's the general idea.

Q. Do you remember the engine going down Track 34 bringing out eight Pullman cars?

A. Yes, sir.

Q. And could you tell us about where you were when the cars were pulled out of the 34 lead?

A. Well, I made a cut on the cars and then walked across to the 28 lead. If I remember right, we had came off on a track, which is 28 lead down to where you got that track going out to the right, off the 28 lead there, and the switch was wrong and I had to walk across and line that switch.

Q. I see. When you say you made a cut of cars, what do you mean by that?

A. Well, I pulled the pin on the car and gave him a sign to come out with it.

Q. Were there more than eight cars on the 34 lead? A. Yes, sir.

Q. And you have to disconnect the No. 8 car from the 9th car, is that right?

A. That's right.

Q. All right. And so after pulling the pins for the eight cars, you were free to start over in the direction of the 28 lead? [91]

(Testimony of Oliver A. Moultin.)

A. That is right, to line the switches over there.

Q. Now, did you see the accident itself?

A. No, sir.

Q. What was the first indication that you knew that an accident had occurred?

A. Well, I knew something was wrong in that they didn't come right down with the car after they switched it out and I started up that way and I met him coming down and I was told John had been hurt due to the grab iron missing on the car.

Q. Did you yourself see the car?

A. Yes, sir.

Q. And was there a grab iron missing?

A. Yes, sir.

Q. Did you see John—Mr. Blazin right after the accident happened? A. Yes, sir.

Q. And would you just tell us what his appearance was?

A. Well, I'd say he was pale and nervous and kind of shaken up a little.

Q. Did you try to talk to him?

A. Yes, I talked to him, asked him if he was hurt bad.

Q. Pardon me?

A. Asked him if he was hurt bad. Told him he had better go to the hospital. [92]

Q. Did he answer back to you clearly?

A. Well, he was a little confused, I believe.

Q. Did he ultimately go to the hospital?

A. Yes, sir.

Mr. Nichols: I think that is all.

(Testimony of Oliver A. Moultin.)

Cross Examination

Mr. Messner: Q. Mr. Moulton, how long have you been working as a switchman for Southern Pacific?

A. Since September, 1941.

Q. Since September, 1941? A. Yes, sir.

Q. How long have you worked in and around the West Oakland Yard? A. Well, since 1950.

Q. I see. A. In the passenger yard.

Q. You have worked considerably in the area where this accident occurred? A. Yes, sir.

Q. Well, the car in question was taken off 34 track and was to be taken down to Track No. 20, is that right, sir? A. Yes, sir.

Q. Now, this is generally what is referred to as the passenger yard? [93] A. That's right.

Q. In that area, isn't it? A. That's right.

Q. Now, Track No. 34, 36, and also 32 to a limited extent, 34 is a track where you find pullman cars quite frequently, isn't that correct?

A. Yes, 34, 6 and 32.

Q. All three of those tracks?

A. 38 and 39 also.

Q. 38 and 39? A. Yes, sir.

Q. Particularly, with reference to Track No. 34, isn't that a track where they do a lot of electrical repair work on pullman cars?

Mr. Nichols: That would be incompetent, irrelevant and immaterial, if the Court please. I see no purpose in that question.

The Court: Overruled.

(Testimony of Oliver A. Moultin.)

The Witness: What is the question?

(Record read by the reporter.)

A. They change the generators there and batteries on the pullman cars there on 34.

Mr. Messner: Q. And haven't you come in there on occasion and found a derail on this track so you would have to go down—— [94]

A. You have to have a derail when you are doing repair work.

Q. You have to have a derail?

A. Yes, sir.

Q. You have been around there and found them there yourself, isn't that right? A. Yes, sir.

Q. Before you can go in you have to go and see the Yardmaster and get specific authority so that somebody can remove the derail?

Mr. Nichols: If the Court please that is entirely incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Messner: Q. Now, Mr. Moultin, down in 20 track, in that area, is an area where the Southern Pacific washes and maintains cars, is it not?

A. I wouldn't say so, I don't believe so. All tracks over there in the Southern Pacific are repair tracks in this area.

Q. Pardon me?

A. Repair tracks in this area.

Q. Pardon?

A. All tracks in a sense.

Q. Now, you didn't see the accident?

A. No, sir.

(Testimony of Oliver A. Moultin.)

Q. How long after the accident was it before you saw Mr. Blazin? [95]

A. I'd say between five and ten minutes.

Q. I see.

Mr. Messner: No more questions.

Redirect Examination

Mr. Nichols: Mr. Moultin, are those tracks also used for storage tracks?

A. Which tracks is that, sir?

Q. 34, 36 and 30, 28?

A. Are they used for storage tracks, you say?

Q. Yes. A. Yes, they are.

Q. And are the linens on the pullmans occasionally changed there? A. What is that?

Q. Are the linens and towels changed?

A. 34?

Q. Yes. A. 34 and 36. Yes, sir.

Mr. Nichols: I think that is all.

The Court: Step down, please. Next witness.

(Witness excused.)

Mr. Nichols: That is all, Your Honor. Will Your Honor adjourn at 4:00 o'clock? I have another witness in the morning. A very short witness, will not be a medical man, [96] will be a lay witness.

The Court: Are you out of witnesses?

Mr. Nichols: Yes, Your Honor.

The Court: Adjourned, ladies and gentlemen of the jury until 10:00 o'clock tomorrow morning. Please observe the admonition that I must of necessity give you. Do not talk about the case, don't

(Testimony of Oliver A. Moultin.)

form or express any opinion about it until it is submitted to you. Tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until Tuesday, November 23, 1954 at 10:00 o'clock a.m.) [97]

Mr. Nichols: Ready, Your Honor.

Mr. Messner: Ready, Your Honor.

The Court: Proceed.

MRS. JOHN BLAZIN

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Nichols: Q. Will you state your full name and occupation for the record?

A. Mrs. John Blazin, I am a housewife.

Q. This is your first trip in Court, is it not, Mrs. Blazin? A. Yes, sir.

Q. Your husband is John Blazin?

A. Yes, sir.

Q. How long have you and Mr. Blazin been married? A. Nine years.

Q. And will you tell His Honor and the ladies and gentlemen of the Jury what his general health was prior to the accident of 1952, September 15 of 1952?

A. Well, it was good. He was always healthy. He did have an appendix operation but he was back

(Testimony of Mrs. John Blazin.)

to work in about a month. [99] And he used to have a garden and chickens.

Q. How large a garden did you people have?

A. About a half acre.

Q. Who built the house that you live in?

A. My husband, his father helped.

Q. Who took care of it, in addition to the garden were there any livestock? A. Chickens.

Q. And who took care of those?

A. My husband.

Q. Now, since the accident have you noticed any change in him?

A. Yes, we don't have a garden any more and have gotten rid of our chickens. He don't seem to be able to keep it up.

Q. What about the maintenance of the house, is he able to do that work?

A. No, not as well, not as much as he used to.

Q. Prior to his accident, was he one that ever complained at all? A. No, no.

Q. Since the accident, has there been any home treatment rendered to him by reason of the accident?

A. We have a heat lamp, and heating pad, and quite often takes these hot baths because they would relieve him. And I would rub analgesic balm, a doctor gave us that. [100]

Mr. Nichols: I think that is all.

Mr. Messner: No questions.

Mr. Nichols: That is all, Mrs. Blazin.

That is the plaintiff's case, Your Honor. The plaintiff will rest.

Opening Statement by Mr. Messner

Mr. Messner: If the Court please, Mr. Nichols, ladies and gentlemen of the Jury, at this stage of the proceedings the defense counsel has an opportunity to tell you what he thinks the proof is going to be, and what is going to be shown by the remainder of the evidence in the case. From here on the case will be rather brief.

We believe that in the first place that this action is brought on the Federal Safety Appliance Act. As His Honor has already told you, that this is the act that imposes absolute liability on the character——

A Juror: We can't understand it.

Mr. Messner: (Continuing) ——imposes absolute liability on the character, where the cars that are in use on its lines are not equipped in accordance with certain specifications.

Now, by the pleadings we have admitted that the car in question was not so equipped. The only remaining question is, whether or not this car was in use on our lines within the meaning of the Safety Appliance Act. [101]

We believe that the evidence has already shown that the car was in a repair area in the yard. And, I believe, that you will recall that the evidence has shown that the car was out of service, it was not in use in interstate commerce within the meaning of the act. We believe the evidence will show that the

car, Charlottesville, had been withdrawn from service by the Pullman Company who owned the car as distinguished from the Southern Pacific Company some two weeks before this accident occurred. And that the car was placed on Track No. 34 in what is known as the Passengers Yard, West Oakland. And the car which was placed there for the purpose of being generally refurbished and overhauled. We believe the evidence will show that during the course of these repairs, which consisted of repainting, reupholstering and other items of repair to modernize the car. During the course of those repairs it was necessary, and the car was moved from Track No. 34 down to Track No. 20, where certain other repairs were to be made, and were, in fact, made. Thereafter the car was returned to Track No. 34 and on October 5, twenty days after this accident, the car was then returned to service and put in use on the lines of the Southern Pacific Company. We believe that that is what the evidence will show.

Now, there has been claim here in connection with certain injuries. There was an accident on September 15th, 1952, and that is the only accident that is the subject of this lawsuit. [102] We believe that the evidence has already shown that there was an accidental injury on September 22nd, 1953. There was something said about a hernia in May of 1953. We believe the evidence has already shown from Dr. Fisher that that hernia was not in existence of October, 1953. We believe that the evidence will show that Mr. Blazin was examined later by a Dr. William Sheppard, Oakland orthopedic surgeon.

Well, rather than tell you what that evidence will show I will have the Doctor in here and he will tell you what he found, and he will give you his conclusions and opinions in connection with Mr. Blazin's health.

I believe that that substantially is what the evidence for the balance of the trial will show, ladies and gentlemen.

Thank you.

WILLIAM J. WELCH

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Will you state your name and occupation for the Court and Jury?

The Witness: William J. Welch, foreman for the Pullman Company in Oakland. [103]

Direct Examination

Mr. Messner: Q. Mr. Welch, how long have you been employed by the Pullman Company in Oakland?

A. I have been with them over nineteen years, sir.

Q. Now, you do not work for the Southern Pacific Company, do you? A. No, sir.

Q. Now, what has been your place of employment during these nineteen years that you have worked for Pullman Company?

A. I worked the entire time in the Oakland yard, sir.

(Testimony of William J. Welch.)

Q. Now, September 15th, 1952, Mr. Blazin, who was the plaintiff in this action was injured in Oakland, West Oakland Yard; were you a witness to that accident? A. No, sir, I wasn't.

Q. Are you familiar, generally, with the tracks in what is known as the Passenger Yard of West Oakland? A. Yes, sir.

Q. Are familiar with the track that is known as Track No. 34? A. Yes, sir.

Q. In your job as foreman with the Pullman Company, do you or do you not have charge of the repairs to cars, pullman cars, that come into West Oakland Yard? A. Yes, sir, I do.

Q. And do you have occasion to make repairs on Track No. 34?

A. Yes, sir, quite often. We make repairs there.

Q. Do you make repairs on Track No. 32?

A. Yes, sir.

Q. You make repairs on Track No. 36?

A. Yes, sir.

Q. Now, in September of 1952, did your company have a program afoot for modernizing and refurbishing cars?

Mr. Nichols: I object to that as incompetent, irrelevant, and immaterial. I, in my opening statement, was going to make a showing that this car had no bad order on it, no bad order sign, and Counsel objected to that. He said that I was without an issue. That negligence was not a matter of issue, limited entirely to the Safety Act. Now, in view of that statement, the defense that he is at-

(Testimony of William J. Welch.)

tempting here, this car was not in service, just doesn't *ly* under the act. If the Court please, the car that was under repair, and to say that the car —that the plaintiff was not working under the provision of the act.

The Court: Do you wish to be heard?

Mr. Messner: If the Court please, and I think perhaps it is a matter—I don't know whether it should be taken up in the presence of the Jury or not.

The Court: It is a matter that I want to take up in the absence of the Jury.

You may be excused for a few minutes, ladies and gentlemen.

(Whereupon the Jury left the Courtroom and the [105] following proceedings were had outside the presence of the Jury.)

The Court: I want to say first of all that I have anticipated this matter. And my views on this particular phase of the case are as follows:

Whether or not this car was in the Oakland yards for purposes of repair or not makes no difference in the opinion of this Court. The Safety Appliance Act was designed by Congress to protect workmen and this man was working.

There were, apparently, no bad order indications or signs on the car, and whether there were or were not, Mr. Blazin, if he is to prevail here at all, is certainly entitled to the full coverage of the Safety Appliance Act as designed to give him. I don't think it makes any difference whatsoever whether

(Testimony of William J. Welch.)

it was in there for refurbishing or for repairs, it was still engaged in interstate commerce, was being readied for interstate commerce and was actually in interstate commerce. And I hold that actually as a matter of law.

Mr. Messner: Well, if the Court please, there have been numerous decisions, various appellate court in connection with this matter.

The Court: That is my decision, just what I have said.

Mr. Messner: If that is the decision of Your Honor, there is no use of pursuing the matter.

The Court: Not a particle because I don't intend to [106] entertain that sort of a defense.

Mr. Messner: Thank you, Your Honor.

The Court: Bring in the Jury.

Mr. Messner: Before you bring in the Jurors, Your Honor, may I—I anticipated that this would be our defense in the action and if that is the case, this witness could be excused. I have no particular purpose in calling another witness that I had in mind. As a matter of fact, I have no other witness until my doctor at 2:00 o'clock. I haven't anticipated Your Honor's ruling.

The Court: All right. If you have no further witness I will suspend until 2:00 o'clock.

Mr. Messner: Thank you, Your Honor.

Mr. Nichols: Any chance of getting, Your Honor, the doctor here at 11:00 o'clock?

Mr. Messner: I tried but——

The Court: This doctor situation is a very bad

(Testimony of William J. Welch.)

one. It is creeping into all of our courts. I don't see any reason why a doctor should be of any more importance than twelve members on this jury, or the Court, or Counsel. These doctors are well compensated for coming in here to testify and why they should be granted any special privileges or immunities is beyond my capacity to understand. I am not critical of you, Mr. Messner, in this regard; you couldn't anticipate it, of course. [107]

Mr. Messner: I think I should like to pursue with this witness and make my record, as I shan't call any other witness.

Mr. Nichols: I wonder if we could do this, if it meets with the approval of the Court, try to get ahold of the doctor in Oakland, and if he could be here at 1:00 o'clock, we might be able to complete this case today.

The Court: If you can get him, I will be available.

Mr. Nichols: Then, we can probably complete the case today.

The Court: We will take a recess until 10:30.

(Short recess.)

Whereupon the Jury returned to the Courtroom, after which the following proceedings were had in the presence of the Jury.)

Mr. Messner: If the Court please, one of the photographs yesterday was—I thought I had put it in evidence. I had not. Mr. Nichols is agreeable.

The Court: Let it be received.

(Whereupon photograph referred to above

(Testimony of William J. Welch.)

was marked Defendant's Exhibit "C" in evidence.)

Mr. Messner: The daily work record of Mr. Blazin from January, 1952, through August 15, 1953, I would like to offer in evidence. Do you have any objection?

Mr. Nichols: No objection to that. [108]

Mr. Messner: Would that be marked next in order?

The Court: It may.

(Whereupon record referred to and more particularly described above was marked Defendant's Exhibit "H" in evidence.)

Mr. Nichols: The X's over to the right hand side show the day off and where there is a reason given, the reason is correct, is that right?

Mr. Messner: That is correct.

May I have the Reporter read back the last question before the recess?

(Question read by the Reporter.)

Mr. Nichols: Object as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Messner: Q. Mr. Welch, was the Charlottesville taken out of service and place on Track 34 in the West Oakland Yard for repairs in September of 1953, 1952?

Mr. Nichols: That calls for an opinion and conclusion, object to it on that ground.

The Court: If he knows, let him answer.

The Witness: I didn't hear that.

(Testimony of William J. Welch.)

Mr. Messner: Q. Do you know the answer?

A. The car was ordered over to 34 Track during the September of 1952. [109]

Mr. Nichols: Ask that the answer be stricken. He asked whether the car was taken out of service.

The Court: Motion granted.

You are instructed to disregard the answer.

Rephrase the question, please.

Mr. Messner: Q. Mr. Welch, was the car, Charlottesville, put on Track 34 during the month of September, 1952?

Mr. Nichols: If the Court please, that is incompetent, irrelevant, and immaterial, admitted that the car was on Track 34.

Mr. Messner: It is preliminary, Your Honor.

The Court: Overruled.

The Witness: The car was ordered onto Track 34 during September of '52.

Mr. Messner: Q. Was repair work performed on that car while it was on that track?

A. Yes, it was.

Q. And was the car on Track 34 between, say, the dates of September 1st and September 15th, 1952?

Mr. Nichols: I am going to object to that on the ground that it calls for the opinion and conclusion. It would be in the record, if the Court please, to show that, that the Southern Pacific would be the people that placed it there.

The Court: Q. Were you there every day during that period? [110]

(Testimony of William J. Welch.)

The Witness: A. Outside of regular relief days.

The Court: Q. Did you have occasion to observe that particular car?

The Witness: A. That, I can't recall definitely. Although, during the regular routine I usually make an inspection of the cars in various parts of——

The Court: Q. Do you recall making an inspection of that particular car?

The Witness: A. Not definitely, no, sir.

The Court: Q. I mean as to whether it was on that particular track. I don't constantly but you observed whether or not it was there during the period that Mr. Messner has mentioned?

The Witness: A. That I don't recall, sir.

Mr. Messner: Q. Mr. Welch, as foreman do you have charge of the records concerning the cars, that is pullman cars, that are on the various tracks in the Passenger Yard? A. Yes, we do.

Q. And at my request did you check your records to determine what track the car, Charlottesville, was on and when it was there?

A. Yes, I checked records for the entire month of September.

Q. Did your records indicate whether or not the car Charlottesville was on Track No. 34?

Mr. Nichols: Object to that question on the grounds that the record would be the best evidence.

The Court: Do you have the records, Mr. Messner?

(Testimony of William J. Welch.)

Mr. Messner: (To the witness) You have the records.

The Witness: I believe Mr. Caldwell has them.

Mr. Messner: May I approach the witness, Your Honor?

(Records handed to witness.)

Mr. Messner: Now, if the Court please, I can offer the records in evidence. Mr. Welch has reviewed them. It would save time having him testify. They are Pullman records and rather difficult for other people to figure them out.

The Court: Q. Do you identify those as the passenger cars on the particular track during the period of time in question?

The Witness: A. Yes, sir.

The Court: It will save time by admitting them in evidence if you have no objection.

Mr. Nichols: I didn't hear what Your Honor said.

The Court: I said, in the interest of time, we might admit them into evidence for such purposes they may serve, without having the witness testify.

Mr. Nichols: If there is any objectionable matter, we may point it out and the Court will later rule on it?

The Court: Yes, that is fine.

Mr. Messner: Q. These are the records for September, 1952? A. Yes, sir. [112]

Q. May these be marked defendant's next in order?

The Court: May be received.

(Testimony of William J. Welch.)

(Whereupon records referred to and more particularly described above were marked Defendant's Exhibit "I" in evidence.)

Mr. Messner: Q. Referring to your records, Mr. Welch, which are marked Defendant's "I" in evidence, does your record indicate the location of the car Charlottesville, in West Oakland Yard on September 2nd?

A. Yes, sir, it showed on September 2nd that car Charlottesville was on Track 34.

Q. Track No. 34. Does the record indicate where the car was on September 3rd?

A. September 3rd?

Q. Yes.

A. The car Charlottesville was on Track 34.

Q. And on September 4th, where was the car?

A. The car was on the same track, Track 34.

Q. Now, have you—I may shorten this if I may.

Mr. Nichols: Certainly, go ahead.

Mr. Messner: Q. Have you heretofore checked through that record to show what particular track that car was on, up to and including September 15th?

A. Yes, sir, I have. It remained on Track 34 during that entire period. [113]

Q. I see. Now, during that period of time, you have heretofore testified that you do certain work on that car, do you not? Do you know the nature of that work?

A. We have also what we classify as the inspection report which listed the amount and types of

(Testimony of William J. Welch.)

work which we did on the car which was of in the nature of repainting, repairing, upholstery work, repairing electrical work, and repairs to certain mechanical features.

Q. I see.

Mr. Nichols: May I see that record, Mr. Welch.

Mr. Messner: Q. Now, on September 15th, on September 16, Defendant's Exhibit I in evidence which you have there, does that indicate that the car Charlottesville was still on Track 34?

A. No, sir. On the morning of September 16 our records indicate that the car Charlottesville was on Track 20.

Q. Track No. 20. And is that Track No. 20 the track that is used for the maintenance and repair of cars?

Mr. Nichols: Just a moment. I object to that as being incompetent, irrelevant and immaterial, what the track is used for.

The Court: Overrule the objection.

The Witness: Track 20 is used for making heavy repairs.

Mr. Messner: Q. Now, is Track No. 20 used exclusively by the Pullman Company for repairs or some other company, does some other company use them? [114]

A. No, the Southern Pacific Company does the majority of work on Track 20. They order the cars there for their heavy repair work.

Q. Well, does the Southern Pacific have some

(Testimony of William J. Welch.)

responsibility in connection with repairs to Pullman cars?

Mr. Nichols: Just a moment. I object; it is incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

Mr. Messner: Q. Does your company repair the running gear on the Pullman cars?

A. No, sir. The running gear——

Mr. Nichols: Well, if the Court please, I will object to that question as immaterial and incompetent. Duty upon the company to provide a safe car doesn't mean necessarily repairs and running gear, I don't think. Wasn't any portion of the car that was involved in the accident.

The Court: Objection sustained.

Mr. Messner: Q. Does your company have the duty of repairing and replacing grabirons?

A. Yes, sir.

Q. Now, from the records that have been admitted in evidence, tell me whether or not the car Charlottesville was returned to service at some date following September 15?

Mr. Nichols: I will object to that as being incompetent, irrelevant, and immaterial, if the Court please. [115]

The Court: Well, I assume it was—I assume that it wasn't turned into a dining car or something to rest on some roadside. Overruled.

The Witness: The record hasn't been submitted in evidence. The papers which Mr. Nichols has there

(Testimony of William J. Welch.)

indicate that the car went out in service on October 5.

Mr. Messner: On October 5, 1952?

A. Yes, sir.

Q. Now, while your men are performing repairs on Track No. 34, do you have any way of locking or protecting that track so that other cars will not come in?

A. Yes, sir. When our employees work on those tracks, they apply a portable derail at each end of the track.

Q. And if that is to be removed, is it to be removed by one of your employees or someone else?

A. Removed by the employees that apply it. No other person is allowed to remove one.

Mr. Messner: I think that is all, Your Honor.

Cross Examination

Mr. Nichols: Q. Mr. Welch, do you mean that if they were doing work on cars on any of those tracks, you would have a derail in there in order to safeguard the men from working, isn't that what you mean? A. Yes, sir. [116]

Q. And when the derail is gone and order is given to move those cars elsewhere, why, the derail is removed, provided no one is working there, isn't that right? A. Yes, sir.

Q. Now, the work that was done on "34", what you call refurbishing, that is, you go through and do the upholstery and light painting, that is done on the track?

(Testimony of William J. Welch.)

A. Yes, doing a minor shopping of those cars.

Q. Involved upholstery and painting, that sort of thing? A. Yes.

Q. Your work on your cars, is any substantial work that is done over in Richmond Yard?

A. Long periodical overhauls, yes, sir.

Q. On that Track 34, during the time it was there, there was a string of cars, some thirty, forty cars in there?

A. Other cars besides Charlottesville, yes, sir.

Q. In other words, there were cars that were actually connected one to the other?

A. Yes, sir.

Q. And when a car, when they say a car is out of service, what they mean is that it is not being run on the record?

A. Yes, sir. We hold it from being used in service until we have repairs completed.

Q. For example, cars are out of service when gone down the yard and restocked with linen, during the time that is being [117] done?

A. Well, yes. That wasn't our exact designation of being out of service.

Q. But when the car or a car is shipped into the S. P. Yard it may still be termed out of service, so far as the company is concerned, but still be moved from track to track, isn't that right?

A. Yes, sir.

Q. And in the event that a car is not supposed to be moved, special orders are given to the train crews, isn't that right? A. Yes, sir.

(Testimony of William J. Welch.)

Q. And if the car has a defect on it, one that comes under the Safety Appliance Act and is known, there should be a sign "Bad Order" on it, isn't that right? A. Yes, sir.

Mr. Nichols: That is all.

Redirect Examination

Mr. Messner: Q. Mr. Welch, was it the custom and practice of the Pullman Company to place "Bad Car" tags on cars on Track 34 prior to September 15th, 1952?

Mr. Nichols: I will object to that on the grounds —incompetent, irrelevant, immaterial, if the Court please.

The Court: Objection sustained.

Mr. Messner: Q. If the Court please, I think Mr. Nichols [118] went into it on a current basis and I think it is important to know what was done in 1952 and what may be done now.

The Court: The Court has ruled.

Mr. Messner: Q. Mr. Welch, do you know whether or not there was a "Bad Order" tag on the Charlottesville September 15, 1952?

A. There is no "Bad Order" tag on the car to my knowledge or is there any record of being one.

Q. I believe that Mr. Nichols asked you something about cars being supplied with linens. Cars that are in use on trains, West Oakland Yard trains, such as come in and go out every day, those cars ordinarily find their way in Track 34 on a daily basis when they come in and out?

(Testimony of William J. Welch.)

A. No, sir. They are lined up, kept in the train, as a unit.

Q. Not broken up then, I take it?

A. Not as an ordinary practice, no, sir.

Q. Cars like the car Charlottesville that was in this repair area in the yard sometime in the early part of September until October 5 of 1952, would it be your custom and practice to supply it with linens on Track No. 34 before you sent it out on October 5, 1952?

A. Cars such as the Charlottesville car that was receiving that heavy work, would ordinarily be stripped of all supplies and linen when we start to work on it and would not again be [119] supplied until such a time as we were through with our work. Then it would be supplied in the regular service and with the regular service.

Q. It would be supplied on Track 34 or whatever track it happened to be on?

A. Whatever track it happened to be on.

Mr. Messner: Thank you very much.

The Court: That is all.

Mr. Nichols: I have no further questions.

The Court: You may be excused.

Mr. Messner: If the Court please, I should like to recall Mr. Blazin for a few questions.

The Court: Take the stand, Mr. Blazin.

JOHN BLAZIN

the plaintiff herein, recalled as a witness on his own behalf, having been previously sworn, resumed the stand and testified further as follows:

Recross Examination

Mr. Messner: Q. Mr. Blazin, working as a switchman in West Oakland, the West Oakland Yard, are you normally assigned to five days a week? A. We have been, yes.

The Court: I didn't hear you.

The Witness: It's in our agreement. [120]

Mr. Messner: Q. The contract between your organization and the Company, you are to work five days a week, is that right?

A. That's right.

Q. And what was in that agreement in 1952?

A. I don't recall if it was in effect then, I believe it was, though, if I am not mistaken.

Q. I see. Do you recall whether or not you took a vacation in November of 1952?

A. I was assigned a vacation the year before for November of 1952.

Q. And in November 1952, you got your vacation and your vacation pay; is that correct, sir?

A. Yes; although, at that particular time vacations were cancelled and I'd been working—I would have been required to work.

Mr. Nichols: Q. That means you would have gotten vacation pay, but would have had to work?

A. I would have had to work and be compensated for working also.

(Testimony of John Blazin.)

Mr. Messner: Q. Is that because there was a shortage of men?

A. I think so at that time.

Q. That shortage of men continued into 1953?

A. I believe it was in, that is, the beginning of 1953 they [121] again opened up vacations. I don't know just when they were cancelled in 1953.

Q. Well, again in November of 1953, when you were out because of an accident, did you take a vacation and get your vacation pay?

A. I got the vacation, it was assigned to me.

Q. Now, in connection with the hernia that we have talked in this case, I believe on or about September 1, 1953, you gave a history of—hospital records of having had a coughing spell or something the day before and then you felt this bulging in your groin, is that correct, sir?

A. I made a statement to the S. P. Hospital, I think. It was at the end of September of 1953 where I complained of a pain and was examined by the doctor, but no hernia was found.

Q. That was in September of 1953?

A. In the latter part.

Q. I see. After the switch incident?

A. Sometime after that, yes.

Q. I see. And then it was again called to your attention in December of 1953, either the last part of November or the first part of December, is that correct, sir, when you had a coughing spell?

A. That is right, sir.

Q. And a few days later, you were operated on

(Testimony of John Blazin.)

for that? A. That is right. [122]

Q. After that operation you remained off work, did you not, until, well, for the entire month of December, and January—December, '53 and January 1954; is that right, sir?

A. Yes, sir. I was off prior—up until February 1 of 1953.

Q. After the hernia operation, you remained off work for two months; is that right, sir?

A. Yes, sir.

Mr. Messner: No further questions.

Further Redirect Examination

Mr. Nichols: Q. You were off, actually, off, when you had a hernia operation, isn't that correct?

A. I was off, injured at that time. I had no release to go to work.

Q. Now, so far as your days of work were concerned, you say there was a five-day week. Were you actually working six days a week during January in '52?

A. In January of '52 and during almost—where there was more business on the Southern Pacific, I work the extra board, which would allow us to work 16 hours a day or whatever our seniority would allow us, which would be more than the eight hours a day, five days a week.

Q. Well, for example, here in January—. May I show this to the witness, this exhibit? [123]

This exhibit would show you worked five days

(Testimony of John Blazin.)

during that month and you had one, two, three, four, five, six, six days off?

A. That is right.

Q. Well, they didn't come on Sundays, but that would be the six days out of the month?

A. That is right.

Q. And then in February, it would appear that you worked the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, nine days straight, and then it is marked here, "Laid off for personal reasons." And on the 11th, 12th, 13th and 14th, up to the 19th, you worked right along steadily, is that right? A. That is right.

Q. Let me ask you, Mr. Blazin, with regard to the car that—suppose a car has a defect at the time this accident happened. Was there a rule that required the car to be marked plainly "bad order" car?

Mr. Messner: If the Court please, I think this car was in the custody of the Pullman Company, and if he—he does not know their custom and practice and therefore it would not be proper.

The Court: Objection sustained.

Mr. Nichols: Q. Well, the car that you were sent down to pull that day, were any of them marked "bad order"? [124]

A. There were cars that were marked "bad order."

Q. Was the car Charlottesville marked "bad order? A. No, sir.

Q. What is your instruction when you see a car

(Testimony of John Blazin.)

that you are ordered to move that does not have any "bad order" sign on it?

A. We are not required to inspect the cars if they have no "bad order" signs. It is taken for granted that the car is all right to work with.

Mr. Nichols: That is all.

Mr. Messner: No further questions.

The Court: You may be excused.

Mr. Messner: I have no other witness, at this time, Your Honor.

The Court: Ladies and gentlemen, Mr. Messner advises me that his doctor who will testify on behalf of the defendant company is engaged in some sort of an operation and can't be here until two o'clock.

I have always been at a loss to understand why doctors' time should be more valuable than anyone elses, but, nevertheless, we are faced with that situation, and I don't want to have you interpret that as being critical of Mr. Messner, so of necessity I will have to excuse you until two o'clock in the afternoon.

You are instructed not to discuss the case amongst [125] yourselves or anyone else; not to form nor express any opinion about it until it is submitted to you at two o'clock this afternoon.

(Whereupon an adjournment was taken in the above-entitled matter until the hour of 2:00 o'clock p.m. this date.) [125-A]

Mr. Messner: Doctor Sheppard.

WILLIAM B. SHEPPARD

called as a witness on behalf of the Defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: William B. Sheppard.

Direct Examination

Mr. Messner: Q. Are you a duly licensed and practicing physician in the State of California?

A. Yes.

Q. And when were you so licensed?

A. I was licensed to practice medicine in 1935; in California, in 1948.

Q. Would you give us some idea of your schooling and training, Doctor?

A. Yes, I received a Bachelor of Arts at Washington Lee University in 1931 and then Doctor of Medicine at Johns Hopkins University School of Medicine in Baltimore, 1935. I interned at Johns Hopkins Hospital during the following year and then was resident in pathology at the Henry Ford Hospital in Detroit. Then had three years of orthopedic surgery at the same hospital, [126] and in 1940 I received a Master and Surgery at the University of Michigan. I then spent a year as resident and assistant medical director at the Alfred R. DuPont Institute in Wilmington, and then obtained a fellowship in orthopedics at the New York Orthopedic Hospital and Dispensary. I then spent four

(Testimony of William B. Sheppard.)

years in the Navy, and the last year I was in charge of orthopedics at the Naval Hospital in Pensacola. After the war I was on the staff at Tulaine University School of Medicine in New Orleans, and the Oxford Clinic at New Orleans, and I practiced there for three years before coming to California in December, '48.

Q. And do you limit your practice to any particular field of medicine, Doctor?

A. Orthopedic Surgery.

Q. Orthopedic Surgery. And what is that specialty, Doctor? What does that consist of?

A. It's anything to do with the locomotion of the individual, the bones and joints, backs, necks.

Q. And your office is in Oakland? A. Yes.

Q. And are you on the staff of any of the hospitals in the East Bay?

A. Yes, I am on the staff at Providence Hospital, Peralta, Merritt, Children's Hospital of the East Bay, and in Berkeley, I am on the staff at Herrick Hospital. [127]

Q. And did you at my request examine Mr. John Blazin? A. Yes.

Q. And when was that examination, Doctor?

A. August the 10th, 1954.

Q. And that examination was performed at your office, was it not? A. Yes.

Q. Now, did Mr. Blazin give you the history of an injury on September 15th, 1952?

A. Yes, he did.

Q. I think all of us here are quite familiar with

(Testimony of William B. Sheppard.)

the history that was given, Doctor, so without repeating it in detail, he advised you that a grab-iron was missing on a car and that he swung around and was struck in the back by the next car?

A. Yes.

Q. Is that substantially the history he gave you?

A. That was the history of how he was hurt, yes.

Q. Now, did he also give you a history of another incident or accident on September 22nd, 1953? A. Yes.

Q. Now, your examination was after both of these incidents, was it not, Doctor?

A. That's right.

Q. Was there anything else significant, Doctor, in the history of this man as he related it to you prior to the accident of [128] September 15, 1952?

A. In the past history?

Q. That's right.

A. No, he had had an injury to the right shoulder in 1947, and in 1948 he said he had fallen between two boxcars and twisted and skinned the right ankle. In October, '52, he had had a swelling, but that was subsequent to the accident.

Q. I see. Well, there was nothing other than what you have told us that was significant in what the man related to you? A. That's right.

Q. Did you perform a complete physical examination on this patient? A. Yes.

Q. Did you cause X-rays to be taken?

A. Yes.

(Testimony of William B. Sheppard.)

Q. Was there anything significant in the X-rays, did you find anything wrong there?

A. No.

Q. You examined the man's chest and his abdomen, did you not, Doctor? A. Yes, I did.

Q. Did you find anything significant in that portion of your examination?

A. No, he had an old healed scar in the right lower part of the abdomen, from an appendix operation, I suppose. It was [129] a McBurney type of scar. I believe it was from an appendectomy.

Q. I see.

A. Also he had a scar in the groin, where an inguinal hernia had been repaired.

Q. All right. Now did you examine his cervical spine, Doctor? A. Yes.

Q. Well, Doctor, now, the cervical spine, what portion of the anatomy is that? Is that something up in here (indicating)?

A. That's the spine between the head and the chest.

Q. I see. A. And neck.

Q. What we laymen call the neck, then, is that right? A. Yes.

Q. Now, what did you find when you examined that portion of Mr. Blazin?

A. There was nothing remarkable one could see. He had a satisfactory range of motion and it was equally well performed in bending and turning and flexion and extension. But he complained of a mild tenderness in the muscles on either side of the neck,

(Testimony of William B. Sheppard.)

and of the base of the head, and in the trapezius muscle. That's the big muscle that goes over the shoulder. And with movements he complained that he had a stretching discomfort, at the extremes of the motion.

Q. I see. Well, now, Doctor, did you find anything in your [130] examination that would be the basis for these complaints of Mr. Blazin, in that part of his anatomy?

A. No, there was nothing I could see.

Q. Was there any muscle spasm?

A. No, not at the time I examined him, no.

Q. Were there any nerve changes that might indicate disability in that area?

A. No, I went over his reflexes and sensory perception and I found nothing there.

Q. I see. Now, Doctor, did you examine that portion of his back known as the thoracic and lumbar spines? A. Yes, I did.

Q. What portion of the back is that, Doctor? Is that the portion from the neck on down to the end of the rib cage; wouldn't that be the thoracic spine?

A. Yes, the thoracic spine is that part of the spine that has the ribs attached, and the lumbar spine is between the thoracic and the spine of the pelvis.

Q. Now, did your X-ray examination cover that portion? A. Yes.

Q. And was there anything significant in those X-rays?

(Testimony of William B. Sheppard.)

A. No, there was no evidence of any injury that I found.

Q. All right. Did you find anything of significance in that area, Doctor? Anything wrong?

A. His posture is not too good. He had considerable lumbar [131] lordosis; that is a sway-back in the low back. The range of motion was very good. He could reach to within three inches of the floor with his knees straight, but with all of the movements he again complains that he felt as though the muscles were being stretched when they were placed under tension. And with palpation, that is, feeling the back, he complained of tenderness over the upper three thoracic vertebrae. That is just below the neck. And in the muscles on either side of the spine between the shoulder blades.

Q. Well now, Doctor, did you find—or did you perform a neurological examination as it might relate to this area of the back?

A. Yes, I went over his sensory perception and inspected the muscles for any twitching or atrophy and I did the reflexes and abdomen and the scrotal and lower extremities, as well as the upper extremities.

Q. Well, is there anything about your neurological examination as it related to the thoracic and lumbar spines that indicated any disability to you?

A. No.

Q. Now, did you find any muscle spasm in that area? A. No.

(Testimony of William B. Sheppard.)

Q. Did you examine Mr. Blazin's upper extremities? A. Yes.

Q. By that I mean, Doctor, his shoulders and arms and so forth? [132] A. Yes, I did.

Q. Did you find anything of significance in that area?

A. No, and I would like to mention, though, I did find in the neurological some relative diminution of sensation of the entire hands on both sides, what I would call a glove type of hypesthesia. It's usually on a functional basis, because it follows no physiological pattern.

Q. Now, Doctor, what do you mean by a functional basis?

A. One that is not due to any organic injury to the nerves, but is often associated with nervousness or apprehension or——

Q. I see. It is a real thing, though, is it not, Doctor?

A. No, not necessarily. It is not real, because often it will pass right away. For instance, some people will feel when they are excited, going on the stage or something of the sort, have to make a speech, their hands might get numb and tingle and then it will go away.

Q. All right, Doctor. Did you perform any tests or anything of that kind?

A. Yes, I checked his grip in both hands. The patient was right-handed and his grip was a little stronger on the right than on the left. Didn't seem

(Testimony of William B. Sheppard.)

to be particularly strong in his grip, although he seemed to be a fairly robust fellow.

Q. I see. Was the difference between the two hands—did you find that to be within normal——

A. Within normal, yes. [133]

Q. Within normal limits. Now were there any particular complaints that Mr. Blazin made relative to the upper extremities, the arms and shoulders and so forth, that you haven't told us about?

A. I don't believe so. Let me check on that.

Yes, he said that sometimes he felt a tingling on all the fingers of his hands.

Q. I see.

A. That would disappear with rest. It would come and go.

Q. I see. Was that consistent with your findings of this hypesthesia, whatever—I think you called hypesthesia?

Q. Yes. Hypesthesia means a relative dullness. You check with the sharp point and with light touch and it felt a little duller along the hands, the pattern of a glove around the hands (indicating).

Q. Now, did you examine Mr. Blazin's lower extremities? A. Yes, I did.

Q. Well, did you find anything of significance in that portion of your examination?

A. No, there was nothing of signifiance. There were two small scars on the top of his left foot, which he said was due to an old acid burn. I had him make a full squat, which he was able to do

(Testimony of William B. Sheppard.)

very well, and with that he said he had some discomfort in the mid-part of his back.

Q. Did you cause to be performed or perform any laboratory [134] studies in connection with him?

A. Yes, I did. I had a number of studies made to see whether or not he had any infection or any anemia, any other—he had told me about an infection that he had had where the glands were swollen, and he had had a high fever, and I wanted to see whether or not he had anything like undulent fever or brutilosis, which will often give you some vague muscle discomfort. All the tests were negative.

Q. Well then, there was nothing of significance in the laboratory findings?

A. Nothing significant.

Q. And, now, based upon your entire examination and the history given you, did you arrive at a conclusion and opinion in connection with this——

A. Yes, including the history and the course of events and my examination and the complaints which he had at the time I examined him, the type of injury he described, where he said the car had hit his entire back and with a delay in significant symptoms,—I think he worked a couple of days afterward, and then he was told that he had a bruise on his back and that fitted with the history that he gave me. I felt that he bruised the back and that apparently his complaints at the time of my examination was only with the extremes of motions that

(Testimony of William B. Sheppard.)

I asked him to do, that he said that there was a sensation that the muscles were being stretched. So I felt that he had been [135] bruised, there had been bruises in the muscles, which had, he still felt when he stretched them to the extremes.

Q. I see. Now, did Mr. Blazin tell you that following the incident of September 15, 1952, some two months later, he had returned to work? Did he give you that history? A. Yes.

Q. Did he tell you that he had thereafter worked for ten months?

A. Yes, he said worked off and on and then in September of '53 he had had a—pulled a switch and felt some pain in his back again, and then that was in the lower portion of the back, but apparently he didn't have too much persistent trouble in that region, and then he was admitted to the hospital, I think it was in December, '53, and during that time he had a hernia repair, and it was either in October of '52 or '52 that he had this swelling of the glands and a high fever for a while.

Q. I see. Well now, Doctor, was Mr. Blazin working at the time you performed this examination?

A. Yes, he said he had been working since February the 1st, 1954, and that he hadn't lost much time since then.

Q. What would be your conclusion, Doctor, as to the ability of this man to continue working as a switchman, bearing in mind the history that he gave you, your examination and all of these various

(Testimony of William B. Sheppard.)

events that you now know about? Do you think [136] that that man should be able to continue working? A. Yes.

Q. Now in connection with the complaints of pain on extreme motion, is there any recognized medical treatment that might be beneficial for one who has that type of complaint?

A. Well, I certainly feel that there is, because I try to explain to all my patients that after any bruising or any inactivity, there's going to be a shortening of the muscles and a tightness, and whenever they are stretched, they are going to hurt. And, of course, the sooner you start to stretch them out, the better off you are and the easier it is. But—and I feel that you have got to persist in your efforts, even in spite of some discomfort, to regain the suppleness of those, because if you don't, any time you reach the limit of what you have been accustomed to, you are going to feel discomfort. The older you are, the more difficult it is. Mr. Blazin, now, is twenty-eight, and I feel that if he would—it's not going to be an exercising once a day, and resting for twenty-four hours, and then —or if you are sore, resting two or three days. But it's a matter of insistent and gradual increase in your range of activities that's going to get him back to where he can do his customary stretching without discomfort.

Q. Well, you feel that if Mr. Blazin follows such a routine, he would get rid of these complaints that he has? [137]

(Testimony of William B. Sheppard.)

A. Yes, all of us know that we don't try to touch the floor for a long time, we can't, and if somebody insisted that we do it all at one time, we would be sore. But if we gradually did it, I think that most of us can.

Mr. Messner: I see. Pardon me just a moment.

Mr. Nichols: Counsel, perhaps we can look at the report while we are waiting.

Mr. Messner: Surely.

No further questions.

Cross Examination

Mr. Nichols: Q. Doctor, you make a number of these examinations for the Southern Pacific, do you not? A. Yes.

Q. And likewise for other agencies and companies that are involved with employees?

A. Yes.

Q. Do I understand you correctly that you think this man may not have been getting the proper treatment? A. No.

Q. Well, he gave you a history, did he not, of having gone to the Southern Pacific Hospital for innumerable times? A. Yes.

Q. Now there isn't any doubt in your mind that the man still has and is still suffering from some of the effects of this [138] injury, isn't that correct, Doctor?

A. Well, I think that the stretching that he complained of, that's all he complained of at the time I examined him and asked him, and had him

(Testimony of William B. Sheppard.)

go through these motions, was probably secondary to the bruise and the inactivity that he had had.

Q. Well, Doctor, you passed this word off, "bruising". Actually don't you believe that there was some tearing to the muscular structure in that man's body?

A. Well, of course, I wouldn't know, but according to the description he gave me of the accident, I don't know why there would be.

Q. Well, let's take the ordinary bruising that you are referring to. You would get a blow and an increased amount of blood in the area and the blood would soon be absorbed and a man should be free of pain, shouldn't he?

A. The blood is sometimes slowly absorbed, and then there is—there's always soreness after a bruise. It may persist for an indefinite period of time. There again, the best result is early exercise and trying to disperse any bruising, get it absorbed.

Q. Did you get a history from this man that he is looking at a signal man and he reaches with one hand and grabs the place where a grabiron is supposed to be and it is there? A. Yes.

Q. Draws himself up and puts his hand on the next place and [139] there's no grabiron, so he swings off and is dragged along with his arms stretched, and he hits the back of the car? Isn't that the history you got from?

A. Yes, but the emphasis, when he told me, was on the blow from the back. [140-A]

Q. Didn't he tell you from the time he dropped

(Testimony of William B. Sheppard.)

it happened so quick he was stunned and didn't know what happened?

A. Well, he told me pretty much in detail how the car was standing still and he got on the step and put his left hand on the left hand hold and reached for the right. And as the cars began to move and the right hand hold was missing, his foot came off the vestibule steps and he went down about eighteen inches. He was still holding on, so, he got between the cars and this second pullman hit him on the back from the head straight down. That is the way he said it. Then it knocked him forward and he stumbled over to the ground.

Q. Are you just assuming that all the man got was a bruise in the back?

A. Well, I was——

Q. Well, the reason I asked you, I want you to call a spade a spade here. We are trying to find out what happened to this man. Are you assuming that all that happened to him was that he got a bruise in the back?

A. No. I think that in the process of all that he may have strained the muscles, too.

Q. Well, you say that this stretching that he has, that he should have. Aren't you saying that in your opinion you think there is some scar tissue that formed in there and that has caused the muscles to contract? Isn't that what you would expect to find if you cut that man open and looked? [142]

A. I doubt it. I doubt if you would be able to see it if you cut him open. I don't think that would

(Testimony of William B. Sheppard.)

be necessary. But I don't think you would be able to detect the scarring. I think that often the muscles will consist of numerous little fibers and then when they have been bruised and overstretched, they tend to contract and they might have some sticking together.

Q. Well, when you say overstretched, you mean torn, don't you?

A. Not necessarily. They are elastic.

Q. Well, when you tear a muscle or pull a muscle beyond its proper, the proper length of doing so, or overextend it, the muscle and small fibers begin to break, don't they?

A. They may, within limits. Yes, I have seen ruptured muscles. You usually know very definitely they are ruptured when ruptured.

Q. Well, Doctor, you were referring on direct examination to some of your own patients. Now, you had a Mrs. Chapman and a Mrs. Martin that worked for the telephone company. Do you remember those women? A. I certainly do.

Q. You had them for over two years and all they had was a stretching of the muscles in the back; isn't that right?

A. That is a simple explanation.

Q. Well, it just happens to be that those two ladies were [143] clients of mine. I remember that. I remember you even put them in a cast.

A. Put one of them in; I don't remember about the other one.

Q. Well, now, those two ladies were sitting in

(Testimony of William B. Sheppard.)

an automobile that had cushions in their backs, weren't they, when the car was bumped?

A. Yes, they apparently—they were thrown off on the floor. And one had pneumonia at the time.

Q. Well, I am not talking about pneumonia.

Well, now, isn't that true that from your studies and from your learning, when you get a person with a back such as this man complained about and with the history that you gave to him, if he came to you and wasn't employed by the Southern Pacific Company, and he came to you for treatment, wouldn't you say, "Well, Mr. Blazin, you have had some scar tissue that has formed down your back. How expensive that is will be the thing that will determine how well I am going to be able to get you"?

A. I don't think I would tell Mr. Blazin that he had scar tissue in his back. My patient—and I told those two women that they needed to stretch those muscles out and that they still needed more exercise.

Q. Why would you want to stretch the muscles out? A. To get them back to suppleness.

Q. What is holding it back? [144]

A. Well, now, that is the point. You have to—many of my patients I have to lead them by the hand.

Q. Well, Doctor, please, I don't—I want to talk about this man because this is the place we are going to do it.

A. Well, I thought you were bringing up the——

(Testimony of William B. Sheppard.)

Q. You wouldn't tell Mr. Blazin that he had scar tissue? A. No.

Q. Now, Mr. Blazin told you he went back to work with a back that ached and a neck that ached, didn't he? A. Yes.

Q. And he went back to work because he wanted to keep his job?

A. I didn't—I assume he did.

Q. And that he could do things standing up, that didn't bother him so much, but when he had to bend over, and when he had to lift anything, he had difficulty with his back. He told you that didn't he? A. Yes.

Q. Now, that didn't indicate to you that he was the type of patient that you had to walk around and lead by the hand, did it?

A. That isn't what I meant. I meant that when anybody feels discomfort—we feel that we are injuring ourselves; we forget that we have all been stiff at one time or other, and we have to regain the suppleness. Even youngsters that play [145] football will get sore and stiff but that doesn't mean he has to quit football.

Q. Well, now, let's get back to Mr. Blazin, again. Isn't it your opinion that there has been scar tissue that has formed within the area of that man's cervical spine and his low back?

A. There could be. I wouldn't know whether or not there has been very much but there is all degrees of scar tissue. In any of us there is bound to be scar tissue in any cut.

(Testimony of William B. Sheppard.)

Q. What is it, Doctor, then, that would cause this man's muscles to need stretching?

A. Because when you rest and don't stretch them, they become shortened.

Q. Well, isn't this what you mean, Doctor, that you take an ordinary muscle of fibers, isn't it?

A. Yes.

Q. And when you get a tearing or a partial rupture, assume that you get a tearing, that area of the tear fills in with scar tissue, isn't that what nature does to attempt to repair that torn muscle?

A. Yes.

Q. And you take a broken leg, for example, nature will fill out a callus and ultimately the two ends grow together? A. Yes.

Q. Now, when you rupture a muscle or a ligament, nature throws out what you medical men call callus scar tissue? [146] A. Yes.

Q. And the thing that concerns you as a doctor, where you have a man that comes in, has a disability, and you X-ray him and don't find any broken bones, the question is as to whether or not that man has any extensive amount of scar tissue in the area involved. Now, isn't that true?

A. Well, yes, that could be. There are variations in these. Sometimes you can see the scar tissue much more than other cases.

Q. Well, take for example, now, the man is injured in September of 1952. With the ordinary individual that comes in and would relate to you what had happened, you would expect him to be without

(Testimony of William B. Sheppard.)

symptoms within a matter of four or five months, wouldn't you? A. Yes.

Q. On the other hand, like the two ladies that you have, some of these people have more damage than others, isn't that right?

A. Some do, that's obvious.

Q. Take this man. You knew you were making an examination for the Southern Pacific Company, didn't you? A. Yes.

Q. Now, here on March 31, 1954, from the Southern Pacific Hospital, "Patient has recurrence, he says, of pain just under it and below the right scapula, procaine given. April 8th [147] returned, stated the shoulder felt good but still having slight occipital and headaches"—I guess. April 16th, this almost two years afterwards, "Still has aches in the cervical region with spasms of the cervical muscles". Now, that would indicate to you that there had been some substantial scarring, wouldn't it, Doctor?

A. It would indicate to me that he still had some recurrent pain there. Did they see the spasm or did they say that he was talking about a spasm?

Q. Well, let's see here. "Still has ache in cervical spine"—let's see, "associated with spasm of the cervical muscles". Well, there is a number of cases they talk about here. Here is one, "Patient much improved but yet still some spasm in the right shoulder and lower back. Patient for massage. Given by Dr. Elwell", that is March 5th.

Now, would that make any difference to you in

(Testimony of William B. Sheppard.)

your examination as to how extensive his injury was?

A. Yes. Apparently he had ben exercising and gotten more pain and spasm.

Q. Here's February 19, "Patient returned with similar complaints, physical therapy offered only temporary relief as to hot baths, at night marked muscle spasm in musculature of the right a.t. of lumbar spine." What does that mean to you as a doctor, if you picked up this chart and found that a doctor has made that finding? [148]

A. It would mean to me that he had pain in the back and muscle spasm.

Q. Well, that muscle spasm is something that is involuntary, isn't it? A. Yes.

Q. And the thing that nature permits the muscles to do, and indicates that this pain is beneath or in the immediate vicinity, isn't that right?

A. Yes.

Q. And a kind of splinting, isn't it, Doctor?

A. That is right.

Q. In other words, the muscle goes into a tension and can't be moved because that area hurts. And by making the muscle involuntarily tight sort of splits it, isn't that right?

A. Yes. And when irritated by pain or—it would be automatically—it's like a cramp in the calf. That is the best explanation. We have all had that experience.

Q. Well, wouldn't that indicate to you here, a matter almost two years after that injury, that

(Testimony of William B. Sheppard.)

there had been some rather extensive scarring in the area?

A. There again that is a difficult question to answer, but—because I felt that there was nothing that I could see in that respect, of course, he did have these complaints. Now, he mentioned during giving the diathermy. That is what I would suggest telling the individual that the diathermy is not going [149] to cure, it will give it temporary relief, but nobody can move those muscles but himself. I felt that is what was needed.

Q. A moment ago, didn't you say when he came in with a spasm in the back, that that indicated that had been moving too much?

A. If you didn't move for a month and then went out and took some exercise, it would be too much.

Q. Well, you said there was a spasm in the back, you said that indicated to you that he had been overexercising the muscles?

A. Yes. And I mentioned that the best demonstration, what we have all seen in the way of spasms, is the cramp in the calf. That is what a youngster will get when he starts playing football.

Q. Suppose you have a man that has an injury that Mr. Blazin has, and suppose he goes to the hospital, not once, but time and time again after working and says, "When I start to work in the morning, it is not bad, but after a couple of hours I get these terrible pains and my back gets tight".

(Testimony of William B. Sheppard.)

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(Testimony of William B. Sheppard.)

Wouldn't that indicate to you that there had been some substantial scarring in that man's back?

A. He told me——

Q. No, Doctor. Answer my question. I am taking this from the record. [150]

A. He didn't tell me that.

Q. I am just taking you to take what I told you, what is borne out by this record.

A. I still wouldn't call it extensive scarring. I would call it shortening of the muscles, tightness of the muscles.

Q. But what tightened it? You won't tell us?

A. What?

Q. What caused it to tighten? What caused it to get short? You won't tell us, is that the idea?

A. I have tried to.

Q. Did you review this record at all?

A. No.

Q. Suppose the people at the hospital, and I will read the record to you, on September 13 of this year, by Dr. R. M. Worth. "Patient returns, still complaining of tension in upper back and lower back which gradually increases and builds up like migraine aches, has several days—see old record, probably taken physiotherapy, heat and X-ray therapy have all been tried and were marked but without—". What is "S" with a dash over the top mean? A. Without.

Q. "——without any marked change, local procaine injections given, relief for four or five days, soreness is always present but occasionally patient,

(Testimony of William B. Sheppard.)

especially with work buildup, after several days work, relieved by resting several days. [151] Patient states the onset of this trouble to two years ago when he received a blow on his back on the job. Patient does not desire local procaine now, just some pain pills to have in reserve in case he needs them. He seems adjusted to it, the idea that the condition is chronic and plans to go to night school to learn a trade that requires less strain with the back and shoulders than a switchman. Patient is given—" and apparently this was some drugs, you can tell me what those are. A. A.P.C.

Q. What does that mean?

A. Aspirin, phenacetin, caffein. That is like aspirin. Empirin is also the same thing.

Q. Pain killing pills. "Patient advised to return if needed. Patient encouraged to follow through with plans for night school."

Now, would your examination and history of this man, your examination and taking this as part of the history, would that lead you to believe that the man actually has some disability now?

A. I didn't deny that. However, I think that that is a little fatalistic, saying that you should accept it as chronic. And since the heat somebody put on his back only gave him temporary relief, I feel that he should be told that he—what he has to do to get rid of this. [152]

Q. What does physical therapy mean to you?

A. Somebody else exercises for you.

Q. Pulling and stretching, doesn't it?

(Testimony of William B. Sheppard.)

A. Well, of course, that will vary. It usually is heat and massage. You get that maybe at the most once a day, maybe once a week. By the time that you get back the next week, you are not better off than you were a week before.

Q. Didn't you know, Doctor, when you take three and four times a week physiotherapy——

A. That is exactly what I mean. When you have somebody move your muscles and massage you once a day for 15 minutes to a half an hour, you still have 24 hours in which to stiffen up.

Q. You said Mrs. Martin and Mrs. Chapman had physiotherapy to the tune of about $400.

Mr. Messner: I would like——

The Court: What is your objection?

Mr. Messner: I think what happened to Mrs. Martin and this other lady is entirely immaterial in this case.

The Court: I think we have had enough of Mrs. Martin.

Mr. Nichols: Q. Well, Doctor, you refer many of your patients to physiotherapists, don't you?

A. Yes, but I always tell them that that is not the thing that will get them moving again.

Mr. Nichols: I think that is all. [153]

Mr. Messner: No questions.

The Court: You may be excused now.

Mr. Messner: Defense rests.

Mr. Nichols: Yes, Your Honor.

Are you through?

Mr. Messner: Yes.

The Court: The Jury is excused for ten minutes.

(Whereupon the Jury left the courtroom and the following proceedings were had outside the presence of the Jury.)

The Court: For the rule with respect to instructions, let the record show that the following instructions, show that the following instructions will not be given.

You may take these numbers down as I give them to you.

Plaintiff's No. 1 will not be given.

Plaintiff's 13, 14 will not be given.

If I go too fast for you gentlemen, please indicate it.

Defendant's 11, 13 will not be given.

The following instructions are rejected because they relate to the applicability of the Federal Employers Liability Act or relate to fault:

Plaintiff's 2, 7, and 8.

Defendant's 5, 9 and 10.

Now, gentlemen, are we in agreement that the issues under the Federal Employers Liability Act are no longer in this [154] case?

Mr. Nichols: Yes, Your Honor.

Mr. Messner: Yes, Your Honor.

The Court: The following instructions are covered by instructions which I have prepared, a copy of which I now hand to you both.

Instructions, copy of which I have just handed to you, cover, following submitted instructions,

cover Plaintiff's 3, 4, 5, and 6, and the Defendant's 12.

Defendant's 4 and 7 are covered by my own general instructions.

The last sentence of the Defendant's Instruction No. 3 will be given.

Defendant's 6 will be given.

Plaintiff's 9 will be given.

The following instructions are modified:

Defendant's Instruction No. 8, last sentence is deleted.

Defendant's Instruction No. 1, first sentence and the last sentence will be given. The portion in the middle of the paragraph of the instruction will be deleted.

Defendant's Instruction No. 3, just the last sentence will be given.

Defendant's No. 2, the last three lines of that instruction will be deleted.

Plaintiff's Instruction No. 10, there are certain minor [155] amendments, for example, at the end of paragraph 3 which reads "and find what he was reasonably certain to have heard and the time loss had he not been disabled. If you find that he was so disabled" and there are certain other minor corrections which will not bother you with that is a matter of course.

The Plaintiff's Instruction No. 11, the fourth line from the bottom, "Prescribes no definite measure of damages" is omitted. And the last phrase "not exceeding the amounts prayed for in the complaint" is omitted.

Plaintiff's Instruction No. 12, four lines from the bottom "mortification where they are shown to exist" is eliminated.

Plaintiff's Instruction No. 15 reads as follows: "If your verdict is in favor of the Plaintiff and against the Defendant, Defendant is liable for all damage approximately resulting therefrom", and then I have inserted "I have heretofore instructed you on approximate cause. In this connection I instruct you that if you find that the original injury".

Then I am giving the usual and customary instructions on the measure of damages and the ordinary and customary general instructions which are given in these cases.

We will take a recess for a few minutes and you may then proceed with the arguments.

(Short recess.)

(The following proceedings were had in the [156] presence of the Jury.)

The Court: Proceed. [157]

* * * * *

Instructions to the Jury

The Court: Ladies and gentlemen of the Jury, this is the time for me to give you the instructions by which you should be guided in your deliberations upon this case. At the conclusion of the instructions you will retire to your jury room to begin your deliberations.

At the time that you were impaneled at the beginning of this case, and at such times as you were dismissed, I cautioned you and admonished you not to discuss this case with anyone, including

yourselves. I instructed you not to suffer yourselves not to be approached by anyone concerning it and not to form or express any opinion about it until such time as it had been finally submitted to you, and I assume that you have strictly adhered to this admonition.

The presentation of the evidence in the case has been concluded. You have listened attentively to the arguments of [192] Counsel. I want you to listen just as attentively to me when I give you the instructions that are necessary in the case.

First, it is your exclusive province to judge the facts. The law permits a Federal judge, if he so desires, to comment upon the evidence, but you have heard all the evidence and you are just as competent as I am to judge the facts. Therefore I express no opinion about them.

It is my exclusive function to instruct you as to the applicable law, which, as I have indicated, you will, in turn, apply to the facts. I do not wish you to understand or to conclude from anything that I may have had occasion to say during the course of the trial or in the course of these instructions that I have intended directly or indirectly to indicate any opinion upon my part as to the facts or as to what I think your finding or your verdict should be, because you alone, ladies and gentlemen, must decide the facts.

In these instructions the Court in no manner or form expresses any opinion, nor does it desire to express any opinion upon the weight of the evidence or the truth or the falsity of any witness'

testimony or that any alleged fact in the case is or is not established. With the questions of fact, weight of the evidence, credit, that you should give to any witness who has been sworn in the case, the Court has nothing to do. These are matters which are entirely within your province and which you, as jurors, under oath must determine [193] for yourselves.

In these instructions which I am about to give you I caution you and admonish you not to select a single instruction alone, or a portion of any instruction alone, but to consider all the instructions in determining any issue that is before you in this case. I likewise instruct you to distinguish carefully between the facts which you have heard here on the witness stand, facts testified to by the witnesses and statements made by the attorneys in their arguments as to what facts have been proved and if there is a variance between the two you must, in arriving at your verdict, to the extent that there may be such a variance, consider only the facts testified to by the witness. And you are to remember that statements of Counsel in their arguments are not evidence in the case unless such statements are made as admissions or stipulations concerning the existence of a particular fact or facts during the trial of this case. The only legitimate purpose of argument is to aid you to assist you in arriving at a verdict that will be just and proper to both sides.

It sometimes happens during the trial of a case —I think it happened once or twice here—that ob-

jections are made to questions asked or to offers made to prove certain facts. Sometimes these objections are sustained by the Court and it sometimes happens that evidence given by a witness is stricken out by the Court upon motion. In any such cases [194] you are instructed that in arriving at a verdict you are not to consider as evidence anything which has been stricken from the record by the Court or anything offered to be proven or contained in any question to which an objection has been sustained by the Court. You are to remember, ladies and gentlemen, that you cannot find a verdict upon mere possibilities or surmises or suspicions however strong they may be. Likewise, your verdict should not be based upon the doctrine of chance, namely that it may chance to be that a fact is more likely to be true than otherwise.

Now, if the attorneys or the Court, during this trial, made any statements outside of the record, that is a statement that was not pertinent or relevant or material to the issues involved in the case, or if the Court, in discussing any objection or motion, made any statement which seemed to you in any way to reflect upon Counsel or seemed to you to indicate that the Court has some opinion upon the merit of the case or upon some fact or issue involved in the case, then I admonish you to disregard those statements, if such a statement was made, in arriving at a verdict in this case.

In civil cases, and this, of course, is a civil case, the affirmative of the issue must be proved. The affirmative here is upon the plaintiff as to all affirm-

ative allegations of the complaint. Upon the plaintiff, therefore, rests the burden of proof of allegations. You are the exclusive judges [195] of the weight and sufficiency of that evidence. Likewise, in civil cases, the preponderance of evidence is all that is required and the burden rests upon the plaintiff to prove his case by a preponderance of the evidence before he is entitled to a verdict. By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force and from which the result that the greater probability is in favor of the party upon whom the burden rests. Preponderance of evidence means not the greater number of witnesses, but the greater weight, probability and convincing effect of the evidence and proof offered by the party holding the affirmative as compared with the opposing evidence. Where the evidence is contradictory, your decisions must be in accordance with the preponderance. Therefore it is your duty, however, if possible, to reconcile such contradictions so as to make the evidence reveal the truth. When the evidence, in your judgment, is so equally balanced in weight, quality, effect and value that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof. You are the sole judges of the weight of evidence here and credit of the witness in determining the credibility of a witness, you should consider whether his testimony is in itself contradictory, whether it has been contradicted by other credible witnesses, whether the statements made by such wit-

ness are reasonable or unreasonable, whether they are consistent with his other statements or with the facts established by other evidence or admitted facts. You may also consider the witness' manner of testifying on examination, the character of his or her testimony, bias or prejudice, if any, manifested by the witness, his interest or absence of interest to execute his recollection, whether good or bad, clear or indistinct, concerning the facts testified to, his inclination, motives, together with the opportunity of the witness to know the facts whereof he may speak, and having thus considered all these matters, you must fix the weight and value of the testimony of each and every witness and of the testimony as a whole. You are not bound to decide this case in accordance with the testimony of any number of witnesses against a less number or against a presumption or other evidence which satisfies your minds. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case. Of course, if any witness examined before, ladies and gentlemen, has willfully sworn falsely as to any material matter, you may disregard his or her entire testimony. That is being convinced that a witness has stated what is untrue, not as the result of a mistake or inadvertent, but willfully and with a design to deceive, you must treat all of such witness' testimony with distrust and suspicion and you may reject it all unless you shall be convinced that the witness, in other particulars, has [197] sworn the truth. All witnesses are presumed to speak the truth. This pre-

sumption may be repelled by the manner in which he or she testified, by the character of his or her testimony, by his or her motive, or by contradictory evidence. Further, that in arriving at any verdict here, you must not permit yourselves to be influenced in the slightest degree by sympathy, prejudice, or any emotion of any kind in favor of or against either party. You must proceed solely upon the evidence introduced and the instructions of the Court. Sympathy is a very commendable quality in the human family: however, it has no place in the jury box.

The Safety Appliance Act, of which we have been speaking during the course of this trial, required under the facts of this case, that the car, the Charlottesville, be equipped with secure grab-irons. The defendant company admits that the Charlottesville was not equipped with a right-hand grab-iron. The sole question you must determine in deciding whether or not the defendant is liable is this:

Did the absence of the grab-iron approximately cause or contribute to the plaintiff's injury?

If you find that it did, you must find for the plaintiff. If you find that it did not, you must find for the defendant.

Since the defendant had an absolute duty to furnish the grab-iron, you must not concern yourselves with the presence of absence of reasonable care on the part of either the [198] defendant railroad or the plaintiff. There has been some talk about the Federal Employers Liability Act. You should disregard that entirely. I repeat, the sole question you

should consider in determining whether or not the defendant is liable is the question I have previously related to you:

Did the absence of the grab-iron proximately cause or contribute to the plaintiff's injury?

Now, the proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces that event, and without which that event would not have occurred. In other words, it is the efficient cause, the one that necessarily set the other cause in operation.

If you find for the defendant on this issue, your consideration of the case will have ended, and you should return with your verdict.

If you find for the plaintiff on this issue, you should then consider the question of damages, the amount of such assessment of damages.

You are not to indulge in speculation nor, as I have previously indicated, should you be swayed by sympathy or prejudice, but you must be controlled solely by the evidence and by the law. The law only permits such damages to be given in this class of cases as will be pecuniarily compensate a person for the injuries sustained by him. You want to remember [199] that each of the parties litigant here is entitled to equal and exact justice at your hands and to a fair and dispassionate consideration of the entire case. Damages in all cases, if awarded, must be reasonable.

You must also consider and determine this case as litigation between persons of equal standing in

the community. You should not be influenced or affected by the fact that a defendant is a railroad or a corporation, nor should you be in any way influenced by any thoughts or ideas that you may have as to the financial standing of any party to this litigation. Such matters have no proper place in a case of this kind.

If damages are awarded, the only which you can award is such as reasonably to compensate for the detriment suffered. There is no purpose here to inflict punishment or impose any penalty or to make an award for the sake of example.

The burden of proof as to the amount of plaintiff's damages is upon the plaintiff, just as is the burden of proof in every other affirmative allegation of plaintiff's complaint.

While it is incumbent upon the plaintiff to prove the amount of damages he has sustained by a preponderance of the evidence, as I have previously defined preponderance of the evidence to you, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the [200] burden of proof in respect of the amount of his damages is to produce such evidence which, when compared to that opposed to it, carries the most weight so that the greater probability is in favor of the party upon whom the burden rests.

However, you can allow nothing for elements of damage which are speculative or conjectural, and as to future detriment you can allow only for that

which the evidence shows with reasonable certainty is likely to follow. If, as to any claimed element of damage or detriment, there is such uncertainty that you cannot determine that such element exists, or that the claimed detriment is reasonably certain to result in the future, then, to the extent of such uncertainty, the plaintiff then has failed to sustain the burden of proof, such uncertainty must be resolved against the plaintiff and in favor of the defendant.

If your verdict be for the plaintiff in this case, the measure of his recovery is what is denominated as compensatory damages; that is, such sum as will fairly compensate him for the injuries he has received. The elements entering into his damages are the following:

(1) The reasonable value not exceeding the cost to said plaintiff of the services for the necessary care and attention of physicians and surgeons, hospital services and X-rays, if any there were, reasonably required and actually supplied to plaintiff in the treatment of his injuries, if any he sustained, [201] as a result of the accident in question.

(2) The reasonable value of the time lost by plaintiff since his injury wherein he has been unable to pursue his occupation. In determining this amount, you should consider evidence of his earning capacity, his earnings and the manner in which he ordinarily occupied his time before the injury and find what he was reasonably certain to have earned in the time lost, had he not been disabled, if you find that he was so disabled.

(3) Such sums also as will compensate the plaintiff reasonably for any loss of earning power occasioned by the injuries in question, and from which he is reasonably certain to suffer in the future, if you find that he suffered such loss. In fixing this amount, you may consider what the said plaintiff's health, physical ability and earning power were before the accident, and what they are now; the nature and extent of his injuries and whether or not they are reasonably certain to be permanent, or if not permanent, the extent of their duration, all to the end of determining the effect of his injury upon his future earning capacity and the present value of the loss so suffered, if any.

(4) You may consider such sums as will compensate plaintiff reasonably for any pain, discomfort and anxiety suffered by him and approximately resulting from the injury in question, if you find any, and for such pain, discomfort and anxiety, [202] if any, as he is reasonably certain to suffer in the future from the same cause.

If from the evidence in the case and under the instructions you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any; you may estimate such damages from the facts and circumstances in evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering

the law leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper.

While the law says that a recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as "physical pain". It includes the numerous forms and phases that mental suffering may take, which will vary in each case with the nervous temperament of the individual, his ability to stand shock, the nature of his injuries, whether permanent or temporary; mental worry, distress, grief, are proper component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages.

If your verdict is in favor of the plaintiff and against [203] defendant, the defendant is liable for all damages proximately resulting therefrom as I have previously instructed you what constitutes proximate cause. I shall have no occasion to repeat it. In this connection I instruct you that if you find that the original injury so impairs the plaintiff's physical condition and he sustained a second injury which resulted by reason of the said weakened condition and which would not have occurred had his bodily efficiency not been so impaired, then the defendant is liable for all of the damages resulting from both the original and the subsequent injury, if any.

You are not to understand that because I have instructed you on the rule of the measure of damages that you are to give damages simply because

instructions have been addressed to you on that. These instructions related to the damages are intended to apply only in the case where the plaintiff is entitled to a verdict but they have no application on the case if liability of the defendant has not been established. Nor should they be understood by the jury as conveying any intimation that in the opinion of the Court the plaintiff is or is not entitled to damages.

I am about to conclude the instructions. Do you have any exceptions?

Mr. Nichols: No, Your Honor.

Mr. Messner: Yes, Your Honor.

The Court: You may be excused for about five minutes. [204]

(Whereupon the jurors left the courtroom and the following proceedings were had outside the presence of the Jury.)

The Court: Proceed.

Mr. Boyd: I wish to apologize for not being present this morning. Judge Harris insisted that I be present at a matter.

Now, as to the instructions,—probably due to my absence—but this new instruction which Your Honor proposed, which has no number, starting with "The Safety Appliance Act required under the facts of this case that the Charlottesville be equipped with * * * grab-irons * * *", Your Honor, I except on the grounds that it takes from the Jury entirely the question as to whether or not this car was in use or whether it was under repair. Now, I don't believe that the matter was taken

up by Your Honor this morning and I felt——

The Court: Well—pardon me, I didn't mean to interrupt you but I think that the Court expressed itself rather clearly on that subject this morning. In other words, I took the position that the Safety Appliance Act, first of all, applies. This is a yardman; the car was being shunted or kicked onto the track. Whether for purposes of repair or refurbishing or not, I think the car was still in interstate commerce while it was being shunted or kicked onto that track. I believe that the Safety Appliance Act is designed, construing it liberally, [205] to protect a workman in just such circumstances, and I thought that I had explained that rather fully to Mr. Messner. I presume he didn't have an opportunity to tell you personally.

Mr. Boyd: No, Your Honor. But I want to make clear for the record that we object to this instruction because this instruction—of course, it is consistent with Your Honor's previous position taken this morning—does withdraw from the Jury entirely whether the Safety Appliance Act applied. That is a matter of law that the car was in use on the lines, we except to, the instruction on that ground, that it is an instruction that as a matter of law the question of whether or not the car was under repair is not before the jury.

So that we may be clear in the record, Your Honor, I agree, Your Honor, that the instruction is consistent with Your Honor's ruling, but we want to make an exception to that instruction.

The Court: The exception will be noted.

Mr. Boyd: That is the instruction Your Honor gave. It has no number. It begins "Safety Appliance Act required * * *" and ends "* * * if you find for the plaintiff on this issue you should then consider the question of damages." To that we except.

The Court: For your records, let it be noted 'A-1'.

Mr. Boyd: Court's instruction 'A-1'.

The Court: Yes.

Any exceptions? [206]

Mr. Nichols: No, Your Honor.

The Court: Bring in the Jury.

(Whereupon the Jury entered the courtroom and the following proceedings were had in the presence of the Jury.)

The Court: Now I am about to conclude these instructions to you, ladies and gentlemen, and I will be very brief.

I admonish you to use your good sense here just as you would in enacting upon the most vital and important matters affecting your own lives and your own affairs. Take your time. Resolve the facts according to your own calm, deliberate, and cautious good judgment, in the light of your own experience and knowledge of the natural tendencies, proclivities, and propensities of human beings the world over. You are, of course, expected if you *can't* conscientiously do so, to agree upon a verdict the verdict must be unanimous, that is, to say, that all twelve of you must agree upon the verdict. You should freely consult with one another in the jury

room and any one of you, if you should be convinced that your view of the case is erroneous, do not stay with that particular view out of stubbornness or because of any pride of opinion, and do not, therefore, hesitate to abandon your own view under such circumstances.

On the other hand, I want you to remember, and you are instructed, that it is perfectly proper and right to adhere [207] to your own views, if after a full exchange of ideas in the jury room you still believe that you are right.

I finally caution you that if it becomes necessary for you to communicate with the Court during your deliberations, or upon a return to the courtroom with respect to any matter connected with the trial of the case, you should not indicate in any manner to the Court how you stand numerically or otherwise.

Your first duty when you arrive in jury room will be to select a foreman or forelady to preside over your deliberations and to sign whatever verdict you agree upon. I would ask that the foreman preside over your deliberations with decorum and efficiency.

These are important issues to be determined with the plaintiff on one hand and the defendant company on the other. All of the exhibits which are properly in evidence will be available to you upon your notifying the Crier. The Clerk has prepared two forms of verdict. The order in which I read them is of no importance. They contain the title of the case.

"We the Jury find in favor of the defendant." and then there is a place for the signature of your foreman or forelady.

The next form contains the same type of court and cause:

"We the Jury find in favor of the plaintiff and assess the damages against the defendant in the sum of—", and write in whatever amount you determine.

Members of the Jury, the case is now with you for your consideration in this matter.

You may retire.

(Whereupon the Jury retired to the Jury room for deliberation.) [208-A]

[Endorsed]: Filed January 6, 1955.

[Endorsed]: No. 14676. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. John Blazin, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 2, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14676

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant,

vs.

JOHN BLAZIN, Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Agreeably to Rule 17, paragraph 6, of the Rules of the above Court, appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of record as follows:

I.

Statement of Points

The points upon which appellant intends to rely are as follows:

1. The trial court erred in instructing the jury, Court Instruction 1A, that the Federal Safety Appliance Act applied as a matter of law which instruction took from the jury a question of fact, namely, whether or not the car was in use within the meaning of said Act.

2. The trial court erred in failing to instruct that the jury could consider whether or not the car was in use within the meaning of the Federal Safety Appliance Act.

3. The trial court erred in ruling that it would not entertain a defense that the car was not in use within the meaning of the Federal Safety Appliance Act.

4. The trial court erred in excluding evidence offered by the defendant as to the nature and extent of the repairs to be made to the car that would have established more clearly that it was not in use.

5. The court erred in ruling that a car out of service, under repair and not in use was subject to the provisions of the Federal Safety Appliance Act.

6. The action proceeded to trial solely under the provisions of the Federal Safety Appliance Act and said Act had no application in that plaintiff (appellee here) was working on a car that was under repair and therefore not in use within the meaning of said Act. There was no evidence that the car was not under repair and the court should have ruled, as a matter of law, that the car was not in use and the Federal Safety Appliance Act did not apply.

7. The verdict is excessive, as to the amount is unsupported by the evidence as a matter of law, was given under the influence of passion and prejudice, and as to amount is excessive.

8. The trial, was guilty of an abuse of discretion, in denying defendant's motion for a new trial upon the ground that the verdict was excessive and/or, if the same was to be denied, in not denying it conditioned only on a remittitur.

II.

Designation

Appellant hereby designates all of the record which is material to the consideration of this appeal, and designates for printing, the whole of the certified record on appeal, including exhibits appropriate for reproduction when required to be printed by rules of this court when designated, excepting only the following:

(a) Plaintiff's proposed instructions;

(b) Defendant's proposed instructions;

(c) Defendant exhibit "I" in evidence;

(d) That portion of the certified typewritten transcript containing counsel's arguments to the jury.

Dated: March 7, 1955.

/s/ ARTHUR B. DUNNE,
/s/ DUNNE, DUNNE & PHELPS,
Attorneys for Appellant, Southern Pacific Company

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 7, 1955. Paul P. O'Brien, Clerk.